Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI.

V. DOUGLAS ERRICO*
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54 pp

QUESTIONS PRESENTED.

1. Whether an estate in land which is separately recognized and protected by state property law should be used as the denominator against which loss of value is to be measured in applying the "deprivation of all economically feasible use" rule for categorical regulatory takings analysis under the Fifth Amendment.

2. Whether a partial regulatory taking in violation of the Fifth Amendment can be established where a regulation defeats a property owner's investment-backed expectations and causes a loss of a substantial part, but not essentially all, of the economic use of a property.

3. The trial court found that the Respondent's permit denial was a regulatory taking in violation of the Fifth Amendment. The Supreme Judicial Court of Massachusetts vacated the trial court judgment, ruling that no taking had occurred. The Massachusetts Supreme Judicial Court went onto hold, *sua sponte*, that Petitioner's constitutional takings claim was not ripe for judicial review. The questions presented are:

a. Whether the denial of one complete land use permit application, which otherwise complied with applicable local bylaws, is sufficient to render the Petitioner's regulatory takings claim ripe for judicial review.

b. Whether the futility exception to the prudential ripeness requirement rendered Petitioner's regulatory takings claim appropriate for judicial review.

c. Whether prudential ripeness is jurisdictional in nature, such that a state appellate court may consider the issue despite the Respondent regulatory agency's failure to raise the issue either at trial or on appeal.

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No. 97-

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI.

INTRODUCTION.

Francis E. Daddario ("Petitioner") hereby Petitions this Court for a Writ of Certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts entered on July 11, 1997. This decision on the merits declared the Petitioner had not established either a categorical or a partial regulatory taking of any interest in his real property and that Petitioner's regulatory takings claim under the Fifth Amendment to the United States Constitution was not ripe for judicial review.

OPINIONS BELOW.

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, dated July 11, 1997 is reported at 425 Mass. 411 (1997). This decision (the "Decision") is reproduced in the appendix. (See Appendix 1a, hereinafter "(A. a)"). The case was decided in the Land Court Department of the Trial Court of the Commonwealth of Massachusetts (the "trial court") with written opinion. The opinion of the Land Court is also reproduced in the appendix (A. 11a).

JURISDICTION.

The Supreme Judicial Court entered its Order on July 11, 1997. Petitioner Daddario timely filed a petition for rehearing with the Supreme Judicial Court. The Supreme Judicial Court denied Daddario's petition for rehearing by notice dated August 5, 1997 (A. 30a). This Petition is being filed within ninety (90) days of the date of the Supreme Judicial Court's denial of said petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows: "nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law."

STATEMENT OF THE CASE.

Petitioner Daddario seeks review of the Decision of the Supreme Judicial Court of the Commonwealth of Massachusetts which held that the denial by the Cape Cod Commission (the "Respondent") of a Development of Regional Impact ("DRI") permit to extract loam, sand and gravel from his property was not a taking without just compensation in violation of the Fifth Amendment to the United States Constitution. Petitioner Daddario further seeks review of the Decision of the Supreme Judicial Court that his regulatory takings claim was not ripe for judicial review.

A. *How the Federal Question Was Presented.*

The Petitioner raised his regulatory takings claim under the Fifth and Fourteenth Amendments to the United States Constitution in his original complaint filed with the trial court on March 1, 1995. The trial court, in its opinion dated June 14, 1996, specifically found:

> In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions. . . .

(A. 27a.) In vacating the trial court's judgment, the Supreme Judicial Court provided, in relevant part, as follows:

> In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the

conclusion that the result below cannot be affirmed.

(A. 5a.) The issues presented by the Petitioner herein, therefore, were clearly considered by the Massachusetts Supreme Judicial Court and form the basis of that state court decision.

B. *Material Facts.*

Petitioner acquired title to the subject premises, consisting of approximately seventy acres of land in Falmouth, Massachusetts (the "Locus"), by deeds recorded in 1964, for the primary purpose of mining the surface and subsurface borrow material therefrom. Petitioner has been the sole owner of the Locus since acquisition.

On or about February 25, 1994, Petitioner filed an application with the Town of Falmouth for approval of a required special permit to extract loam, sand and gravel from the Locus. Petitioner's proposal called for the phased excavation of sand and gravel from approximately thirty-one acres of his approximately seventy-acre parcel. The proposal provided for reclamation, including grading, loaming and seeding of each of seven phases and a 200-foot buffer with all abutters as required by the Falmouth Zoning By-Law. The Falmouth Zoning Board of Appeals determined that the proposed project constituted a development of regional impact under the Cape Cod Commission Act (the "Act") and immediately referred the application to the Respondent Commission on March 11, 1994.

The Respondent is a regional planning agency created by the state Legislature in 1989. The Respondent has permit authority relating to, among other things, commercial developments of regional impact, as Petitioner's proposal was clas-

sified. The Respondent has promulgated regulations with which proposals for DRI permits must comply. Jurisdiction is concurrent with the Town, and after DRI review, proposals must also be permitted by the local regulatory agency.

After conducting several hearings, the Respondent denied the Petitioner's application on February 2, 1995. Prior to the denial and during the review process, Respondent's staff suggested two facially infeasible "alternative" plans of excavation to Mr. Daddario. The first proposal, dated May 24, 1994, called for the complete excavation of the 200-foot buffer to the east of the Locus, in contravention of the Town of Falmouth By-Law. The second proposal, dated September 20, 1994, authorized significantly less excavation than the first "alternative," and also would have involved complete excavation of the 200-foot buffer to the east of the Locus. After the denial, the Petitioner filed an action in the Land Court claiming, *inter alia*, that the Respondent's denial constituted a regulatory taking under the State and Federal Constitutions.

Subsequent to the trial of this action in the Land Court, Mr. Daddario was granted a hearing before the Board of Appeals of the Town of Falmouth, and the project as proposed was granted a special permit by the Town on October 13, 1996.

The trial court, in a decision dated June 14, 1996, held that the denial of the DRI Permit constituted a taking under the Massachusetts and the United States Constitutions. The trial court applied an *ad hoc* test in analyzing the takings issue, including three main factors: economic impact, interference with investment-backed expectations, and the character of the government action. On the question of economic impact, the trial court held that there had been "a denial of economically viable use of the property as a result of the regulatory imposition," finding "that prior to the [Respondent's] actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none." (A. 24a.) The trial court went

on to find that while "Locus may still have substantial value for other development," the evidence, which included the magnitude of the financial loss, demonstrated that "the action of the [Respondent] has crossed the line from a noncompensable 'mere diminution' to a compensable taking." (A. 24a.)

The trial court made no specific factual findings as to the value of the Locus as regulated. The Respondent's expert estimated the value of the property as regulated to be $550,000.00 to $600,000.00 for residential uses. The Petitioner's expert testified that the only feasible remaining use of Locus was as conservation land and ascribed a value of $465,000.00. The Petitioner's expert provided the only expert opinion as to the value of Locus as a sand and gravel mine. If this unchallenged estimate as to the value of the property as a sand and gravel mine is accepted, the residual value of the property for residential uses reflects a seventy-eight percent (78%) loss of value in Locus as regulated, while sale as conservation land will result in an eighty-two percent (82%) loss of value in the property as regulated.

The Respondent appealed the trial court's decision. The Supreme Judicial Court of Massachusetts granted Respondent's petition for direct appellate review. On appeal, the Supreme Judicial Court of the Commonwealth of Massachusetts vacated the judgment of the trial court, and found no taking. The Petitioner argued on appeal that the loss of his mining estate constituted a categorical taking of that property interest. The Supreme Judicial Court, citing *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987) and *Hodel* v. *Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), found that the restriction of a landowner's right to extract minerals from his property is not necessarily a regulatory taking, reasoning that the "property as a whole retains substantial value." The Supreme Judicial Court made no refer-

ence to Petitioner's claim that he owned a separate and distinct mining estate recognized for takings purposes by state law.

The Supreme Judicial Court, concluding that the regulatory action involved neither a physical invasion nor a complete deprivation of use, then articulated "several interrelated factors which are to be considered in determining whether a compensable taking has occurred" (A. 7a), including (1) the economic impact on the Petitioner; (2) interference with Petitioner's distinct investment-backed expectations; and (3) the character of the governmental action. The court concluded on the merits of Petitioner's takings claim that because "the property has substantial economic value for other uses" (A. 10a), there was no taking. The Supreme Judicial Court provided no discussion of the interrelated factors listed above.

The Supreme Judicial Court, despite ruling on the merits of Petitioner's takings claim, also found that the claim was not ripe, as no final determination had been reached by the Respondent. The Supreme Judicial Court reasoned that the denial of one application, submitted with "requisite materials" (A. 4a), did not result in a final determination. The Supreme Judicial Court also relied on the "alternative" plans for buffer excavation suggested by the Respondent's staff, which it found "would have permitted sand and gravel extraction on twenty-five acres" (A. 9a), despite acknowledging earlier in its Decision that the Town By-Law required the 200-foot buffer with abutting properties (A. 3a, n.1). The Supreme Judicial Court did not analyze the language of the Respondent's DRI permit denial itself in its discussion of ripeness, nor did it consider that the Respondent had conceded the ripeness issue both at trial and on appeal.

REASONS FOR GRANTING WRIT.

The Petitioner respectfully submits that certiorari should be granted because the case presents significant unsettled issues in the area of regulatory takings jurisprudence. The Petitioner's claim of a categorical taking of his mining estate raises a question specifically left unanswered by this Court in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992), namely, whether the denominator against which loss is to be measured should be determined by assessing the degree to which a state has accorded legal recognition and protection to that property interest. The case also presents the Court with the opportunity to resolve the unsettled question of whether loss of a substantial part, but not essentially all, of the economic use of property can provide the basis for a partial takings claim under the *ad hoc* analysis articulated by the Court in *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). The ripeness issues allow the Court to speak definitively as to: (1) whether the submission of one meaningful application for a land use permit which is unequivocally denied can provide the basis for a ripe takings claim; (2) the factors which should be considered in assessing prudential ripeness and the futility exception thereto; and (3) whether an appellate court can raise the ripeness issue *sua sponte*.

A. *The Categorical Taking and the Denominator Issue.*

By granting certiorari on the categorical takings claim presented by the Petitioner, the Court can establish a consistent rule concerning the determination of the denominator or "property interest" against which loss of value should be measured in categorical regulatory takings analysis. As this Court has observed, the rule regarding "deprivation of all eco-

nomically feasible use" lacks precision, due to the uncertainty associated with the determination of the appropriate denominator. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. at 1016 n.7. The *Lucas* Court suggested, but did not decide, that the appropriate inquiry in establishing the denominator is a consideration of the legal recognition and protection afforded a particular property interest under state law. In this case, the Massachusetts Supreme Judicial Court improperly combined the Petitioner's mining estate and his residual interest in the surface estate in determining the denominator for its takings analysis under a "parcel as a whole" theory. Further direction from this Court on the issue is essential, given the conflicts in decision and principle which exist between and among the circuits and states. A grant of certiorari also allows the Court to resolve apparent inconsistencies in pronouncements by this Court over the years on the question presented.

The Supreme Judicial Court's application of the "parcel as a whole" theory to the Petitioner's separate and distinct mining estate appears to conflict directly with the decision of the Federal Circuit Court of Appeals in *Whitney Benefits, Inc.* v. U.S., 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991). Relying on the decisions of this Court in *Keystone* and *Hodel*, the Supreme Judicial Court concluded that the loss of mineral rights is not necessarily a taking when the "property as a whole" retains substantial value-interpreting "property as a whole" as both the Petitioner's mining estate and his separate interest in the surface estate. In *Whitney Benefits*, the holding of the Federal Circuit Court established that where state property law recognizes separate mineral and surface estates, and mineral rights are properly subject to the takings clause of the Fifth Amendment, the estate against which loss is to be measured for takings purposes is the mineral estate, and the inquiry does not implicate the uses, if any, of the remaining surface estate. 926 F.2d at 1174.

The Federal Circuit Court in *Florida Rock Indus.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994); *cert. denied*, 115 S. Ct. 898 (1995) also considered a property owner's right to mine subsurface minerals as a separate "property interest," the destruction of which would constitute a compensable taking. 18 F.3d at 1572. The Tenth Circuit, however, in *Clajon Prod. Corp.* v. *Petera*, 70 F.3d 1566 (10th Cir. 1995), specifically rejected the *Florida Rock* approach, relying on *Penn Central* in concluding that the *Florida Rock* approach inappropriately divided a single parcel into discreet segments. The Supreme Court of Wisconsin, in *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), also rejected the *Florida Rock* approach relying on *Keystone*, finding it inappropriate to segment a contiguous property to determine the denominator for takings purposes. The Wisconsin Supreme Court, and the Massachusetts Supreme Judicial Court in this case, fail to recognize that the Court in *Keystone* analyzed the takings question only as to the property owner's remaining mining estate, dividing the property owner's estates exactly as Petitioner suggests is appropriate herein. The conflicts in decision and principle which exist on this issue can be resolved by this Court by granting the Petitioner's request for certiorari.

The importance of resolving this question is underscored by the fact that decisions of this Court in regulatory takings cases involving distinct estates in real property can, themselves, be viewed as inconsistent. In *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922), a mining case, the Court first analyzed the separate real property estates recognized by the Commonwealth of Pennsylvania, concluding that support by the subjacent strata was a separate support estate entitled to recognition for takings purposes. The Court then held that a regulation which effectively denied all economic use of the support estate was a taking in violation of the Fifth Amendment. 260 U.S. at 414. In *Keystone*, a very similar mining rights case, the Court

again analyzed the separate and distinct estates recognized by the Commonwealth of Pennsylvania, but concluded that a similar regulation of the support estate was not a taking. While the Court came to different conclusions in each case, attributable simply to the Court's conclusion in *Keystone* that the support estate was not a separate estate under state property law, the Court clearly considered the mining estate as a distinct whole parcel for regulatory takings analysis.

In *Penn Central*, however, this Court rejected an argument advanced by the property owner based, at least in part, on its loss of the allegedly separate rights it possessed in the air space above an existing building. The *Penn Central* Court provided no discussion of the extent to which the property laws of the State of New York recognized a separate and distinct estate in air rights. Similarly, *in dicta* in *Hodel,* another pre-*Lucas* takings case involving the loss of mining rights under a Virginia statute, the Court opined that a property owner had not been deprived of economically viable use of his property where, *inter alia*, the act did not purport to regulate or proscribe non-mining uses of such land. Again, however, the Court did not engage in any analysis of the extent to which the Commonwealth of Virginia recognized a separate and distinct mining estate. The Petitioner, therefore, respectfully requests that this Court grant certiorari to resolve this longstanding and unsettled question and establish a rule that where state property law recognizes a separate estate in land and accords legal protection to such separate estate, the estate should be treated as a distinct whole parcel and used as the denominator for categorical takings analysis.

B. *The Partial Taking Issue.*

This case also gives the Court an opportunity to answer another significant question left open in *Lucas*: whether loss of a substantial part, but not essentially all, of the economic use of a property can result in a regulatory taking. 505 U.S. at 1017, n.8. The clarification of this issue will also resolve conflicts between and among the federal circuit courts and state courts on this question.

The decision of the Supreme Judicial Court, that substantial after-imposition economic value is an absolute bar to a partial takings claim, conflicts in principle with the Federal Circuit Court of Appeals decisions of *Yancey* v. *U.S.*, 915 F.2d 1534 (Fed. Cir. 1990) and *Florida Rock Indus.* v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 115 S.Ct. 898 (1995). In *Yancey*, the Federal Circuit, in finding a taking where property value went from $91,616.00 to $20,887.00, held, without equivocation, that there exists no automatic numerical barrier preventing compensation in a partial takings case, but that the court must weigh all relevant considerations, including percentage diminution, in assessing the severity of the economic impact to a property owner. 915 F.2d at 1541. The Federal Circuit in *Florida Rock*, in considering whether a partial taking could be found where a regulation deprives an owner "of a substantial part but not essentially all of the economic use or value of the property," noted that "the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests." 18 F.3d at 1568. The Ninth Circuit has also found a taking where a property retained significant value. *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (sale of property to State of California for $800,000.00 more than the purchase price not dispositive on economic impact for takings purposes).

The bar imposed by the Supreme Judicial Court in this case, however, is not novel. Since this Court decided *Lucas*, the Supreme Court of the State of Wisconsin, in *Zealy* v. *City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), relying in part on *Lucas*, found that where a parcel "retains substantial uses . . . we cannot conclude that the City's rezoning deprived [property owner] of all or substantially all the use of his land," concluding that without such loss "a taking cannot occur." 548 N.W. 2d at 534. Similarly, the Eleventh Circuit, in *Corn* v. *City of Lauderdale Lakes*, 95 F.3d 1066, 1072-74 (11th Cir. 1996) *cert. denied*, 114 S.Ct. 1400 (1996) appears flatly to reject any possibility of a regulatory taking where a property has remaining economic use, concluding that the standard for a taking is whether a regulation has denied all or substantially all economically viable use of land.

It is, therefore, vital that the Court resolve this conflict and determine whether remaining economic use is an absolute bar to a partial takings claim or whether, despite such remaining economic use, an unconstitutional taking may still be found applying the *ad hoc* factors analysis of *Penn Central*.

C. *The Ripeness Issues.*

The question of whether the submission of one meaningful and reasonable permit application renders a takings claim ripe for judicial review has not been settled by this Court. There presently exists no *per se* rule requiring multiple applications to establish ripeness, *see, eg., MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), nor is it clear that one meaningful application itself is sufficient to establish ripeness, *Suitum* v. *Tahoe Regional Planning Agency*, 117 S.Ct. 1659 (1997). It is also unclear

what, if any, other factors are appropriately considered in determining ripeness. *See MacDonald*, 477 U.S. at 359 (White, J., dissenting); *see also Herrington* v. *County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989). The Court simply has not had occasion to rule definitively on the applicable standard. In fact, in *Suitum*, the Court's most recent decision on the prudential ripeness issue, this Court declined to adopt a rule that "one meaningful application" is sufficient to establish ripeness, concluding that the issue was not presented in that case. The issue is clearly presented here, where the Petitioner filed a permit application to mine less than half of his land which complied with the applicable Town By-laws and which application the Supreme Judicial Court found to be submitted with "the requisite materials." (A. 4a.) The Court should grant certiorari to settle the question of whether one meaningful application (and resort to variances, if available) renders a claim ripe for judicial review, and to provide guidance concerning those other factors which may be considered in connection with a determination of prudential ripeness.

In granting certiorari, the Court can also establish the scope of the futility exception to the prudential ripeness requirement. This Court did not have such an opportunity in *Suitum*, as the question presented did not involve a discretionary decision by the regulatory agency. Similarly, the decision by this Court in *Lucas*, concerning the futility of submitting a plan for development, was based on the non-discretionary nature of the regulation involved. At least two circuit courts have held that one meaningful application is a condition precedent to an application of the futility exception. *See Southern Pac. Transp. Co.* v. *City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *Unity Ventures* v. *Lake County*, 841 F.2d 770 (7th Cir. 1988) *cert. denied*, 488 U.S. 891 (1988). However, the First Circuit, in *Gilbert* v. *City of Cam-*

bridge, 932 F.2d 51, 61-62 (1st Cir. 1991), *cert. denied,* 502 U.S. 866 (1991); *reh'g denied*, 502 U.S. 1051 (1992), characterized the one meaningful application standard as "ordinarily" a prerequisite to an application of the futility exception, referring to "other fact-dominated allegations" which could bring a claim within the futility exception. It is respectfully requested that this Court grant certiorari to declare whether one meaningful application is a condition precedent to an application of the futility exception, and to develop the law regarding those factors which a court should, or may, consider in applying the futility exception after such conditions precedent, as determined by the Court herein, have been satisfied.

The Supreme Judicial Court's treatment of prudential ripeness as a jurisdictional matter which cannot be waived or conceded by a regulatory agency fails to recognize the fact-intensive nature of the ripeness inquiry and should not stand. This is not an isolated concern, as the question was addressed by the Ninth Circuit in *Traweek* v. *City and County of San Francisco*, 920 F.2d 589 (9th Cir. 1990), which also found prudential ripeness to be jurisdictional. By granting certiorari, the Court can address this issue on unambiguous facts. The Petitioner contends that a regulatory agency's concession of prudential ripeness at trial must be binding, particularly where the Petitioner has necessarily acted to his detriment in reliance thereon in accepting the concession and omitting evidence relating thereto. This Court should, therefore, grant certiorari to establish that prudential ripeness considerations are not jurisdictional and may be conceded by the parties at the trial level.

CONCLUSION.

For all of the foregoing reasons, Petitioner Francis E. Daddario respectfully requests this Honorable Court to grant his

petition for certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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APPENDIX A.

Daddario *v.* Cape Cod Commission.

FRANCIS E. DADDARIO *vs.* CAPE COD COMMISSION.

Suffolk. March 4, 1997. - July 11, 1997.

Present: WILKINS, C.J., ABRAMS, LYNCH, & FRIED, JJ

Cape Cod Commission. Regulatory Agency. Constitutional Law, Regulation, Taking of property.

This court concluded that property owners aggrieved by an action of the Cape Cod Commission disapproving a commercial project could not assert a taking claim under St. 1989, c. 716, § 17(*b*), absent a final determination by the commission on the nature and extent of development that the commission would permit. [414-415]

Discussion of the principles to be applied and factors to be considered in determining whether government conduct amounts to a regulatory taking. [415-417]

In the circumstances of the Cape Cod Commission's disapproval of the proposed extraction of sand and gravel from a certain parcel of land in an agricultural district, the record before a judge of the Land Court did not support his ruling that a regulatory taking had occurred, where the commission's decision did not preclude less extensive mining than proposed and where the property had substantial value for alternative uses. [417-418]

CIVIL ACTION commenced in the Land Court Department on March 1, 1995.

The case was heard by *Robert V. Cauchon, J.*

The Supreme Judicial Court granted an application for direct appellate review.

Eric W. Wodlinger (H. Hamilton Hackney III with him) for the defendant.

V. Douglas Errico (Thomas O. Moriarty with him) for the plaintiff.

The following submitted briefs for amici curiae:

Paul W. Edmondson, Elizabeth S. Merritt, & Laura Nelson, of the District of Columbia, *& Jerold S. Kayden,* for the National Trust for Historic Preservation in the United States.

Jeffrey M. Bernstein & Kenneth L. Kimmell for the Association for the Preservation of Cape Cod, Inc., & others.

[412] *Scott Harsbarger,* Attorney General, *& Madelyn Morris,* Assistant Attorney General, for the Commonwealth.

R. Jeffrey Lyman for the Massachusetts Audubon Society & another.

LYNCH, J. The plaintiff filed an action in the Land Court against the Cape Cod Commission (commission), pursuant to St. 1989, c. 716, An Act establishing the Cape Cod Commission (act), seeking judicial review and declaratory relief from the denial of a development permit. The judge ruled that the commission's decision constituted a taking under the State and Federal Constitutions, and pursuant to § 13 *(f)* of the act, ordered the commission to approve the plaintiff's development. We granted the commission's application for direct appellate review, and now vacate the decision of the Land Court.

The judge found the following facts. The commission was created to coordinate regional planning and land use development on Cape Cod. To accomplish this objective, the commission drafted a regional policy plan which seeks to balance economic development and natural resource conservation. Developments of regional impact, including any outdoor

commercial space greater than 40,000 square feet, are reviewed by the commission to determine whether they conform with the regional plan. § 12 *(c)* (6) of the act. The commission may approve, or approve with conditions, a proposed development if (1) the probable benefit from the project outweighs the probable detriment, (2) the project is consistent with the regional policy plan, and (3) the project is consistent with municipal development by-laws. § 13 *(d)* of the act. If the commission disapproves, the project may not go forward. However, any party aggrieved by the commission's decision may seek judicial review in the Superior Court or the Land Court. § 17 *(b)* of the act.

In 1964, the plaintiff purchased seventy acres of land (parcel) in Falmouth. The parcel is located in an AGA (agricultural) zoning district. Pursuant to art. XXIX of the Falmouth zoning by-laws (by-laws), earth removal is permitted in an AGA zoning district on the issuance of a special permit.[1]

[413] In February, 1994, the plaintiff applied to the zoning board of appeals of Falmouth (board) for a special permit. The proposed project called for the extraction of sand and gravel in seven phases, each approximately five acres. Each phase was to be reclaimed through grading, loaming, and seeding before work commenced on the next. The project qualified as a development of regional impact and the board referred it to the commission for review.[2]

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[1] The by-laws require that earth removal sites have a border buffer strip of at least one hundred feet from the side line of any road and two hundred feet from all abutting property lines, unless written consent of the abutting property owner has been received by the zoning board of appeals of Falmouth. The by-laws also require reclamation by grading, reloaming, and seeding.

[2] Once a municipal agency refers a proposed development to the commission or receives notice of the commission's intent to review a project, the municipal agency must suspend its review. § 12 *(h)* of the act.

In June, 1994, the plaintiff submitted an application with the requisite materials. After two public hearings, the commission denied the plaintiff's application because it did not meet the commission's standards for protection of natural resources, preservation of open space, and acceptable burdens on community infrastructure. The commission concluded that the proposed project "would not enhance or protect open space on the site in a way that respects the importance of sensitive natural resources of Cape Cod." The plaintiff appealed from the commission's decision to the Land Court.

The judge ruled that the commission's actions constituted a regulatory taking. He found that, prior to the commission's action, the parcel had "substantial value as a sand and gravel operation and that thereafter it had little or none." The judge indicated:

> "I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments, grant of the requested relief. I do find that even though [the parcel] may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes, certainly demonstrate that the action of the [c]ommission has crossed the line from a non-compensable 'mere diminution' to a compensable taking."

The judge ordered the commission to approve the plaintiff's plan subject to certain conditions.

[414] The commission appealed arguing that the court erred in ruling that the commission's disapproval of the project constituted a regulatory taking. The commission further argued

that the decision entered in the Land Court was erroneous in that the judge: (a) ordered the commission to approve the project and established the only conditions to be attached to the approval; (b) failed to provide adequate findings of fact as required by Mass. R. Civ. P. 52 (a), as amended, 423 Mass. 1402 (1996); (c) applied the wrong standard of review to the commission's decision; and (d) failed to find that there was sufficient evidence at trial to demonstrate that the commission's decision was not arbitrary or capricious. Because we decide that the judge erroneously concluded that the commission's action constituted a taking, we need not reach these additional arguments.

Discussion. In deciding this case we consider both the Federal ripeness doctrine and regulatory taking principles and determine that both lead to the conclusion that the result below cannot be affirmed.

a. Ripeness doctrine. The Supreme Court has consistently declined to consider unripe takings claims. See *MacDonald, Sommer & Frates* v. *County of Yolo,* 477 U.S. 340, 351 (1986); *Williamson County Regional Planning Comm'n* v. *Hamilton Bank,* 473 U.S. 172, 186 (1985); *Agins* v. *Tiburon,* 447 U.S. 255, 260 (1980). See also *Wilson* v. *Commonwealth,* 413 Mass. 352, 356 (1992). The ripeness doctrine provides that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank, supra* at 186.

The act's provisions for judicial review of the commission decisions may be in conflict with the ripeness doctrine as it applies to takings claims. Section 13 (*f*) of the act provides:

> "Notwithstanding the provisions of subsection (*d*) of section thirteen, the commission shall approve or approve with conditions a development of regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitu [415] tions; provided, however, that no reasonably foreseeable danger to the public health or safety will arise from such approval or approval with conditions."

Section 17 *(b)* of the act further provides: "Any party aggrieved by a commission decision on a development of regional impact may appeal the commission's decision to the Barnstable county superior court or the land court." There is no requirement that the applicant must submit alternative plans or demonstrate that a final determination has been reached on the nature and extent of the permitted development before appealing from a decision. Thus, the statute can be interpreted to provide for judicial review of individual decisions to determine whether the commission's disapproval constitutes a taking. See *Keenan, petitioner,* 310 Mass. 166, 179 (1941) (General Court has power to modify, enlarge, diminish, or transfer jurisdiction). See also Part II, c. 1, § 1, art. 3, of the Massachusetts Constitution.

However, "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *MacDonald, Sommer & Frates v. County of Yolo, supra* at 348. Thus, property owners cannot assert a taking claim under § 17 (*b*)

absent a final determination on the nature and extent of development that the commission will permit.

b. Regulatory taking principles. The judge found that, prior to the commission's action, the plaintiffs property had substantial value as a sand and gravel operation and thereafter it had none, although the property may still have substantial value for other development. The plaintiff argues that this was proper because his proposal was the only economically viable alternative for mining operations and thus the commission's denial of it was a taking.[3] We disagree. We conclude that the record does not support a finding that a taking has occurred.

"When a regulatory taking involves neither a physical invasion nor a complete deprivation of use, as in the case here, Federal law [416] has established several interrelated factors which are to be considered in determining whether a compensable taking has occurred: '(1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the Governmental action" ' " *Leonard* v. *Brimfield,* 423 Mass. 152, 154, cert. denied, 117 S. Ct. 582 (1996), quoting *Connolly* v. *Pension Benefit Guar. Corp.,* 475 U.S. 211, 225 (1986). See *Lucas* v. *Peabody,* 417 Mass. 299, 304 (1994). See also *Litcas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992), and cases cited. "[T]here may . . . be a regulatory taking based, in part, on the regulation's economic impact on the property as a whole and the extent to which the regulation has interfered with a property owner's distinct investment-based expectations." *Steinbergh* v. *Cambridge,* 413 Mass. 736, 742 (1992), cert. denied,

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[3] The plaintiff's argument that art. 10 of the Massachusetts Declaration of Rights grants him greater rights than the United States Constitution does not rise to the level of appellate argument. See *Greater Media, Inc. v. Department Of Pub. Utils.,* 415 Mass. 409, 418 (1993) (four-sentence discussion which merely cites statue does not rise to level of proper appellate argument).

508 U.S. 909 (1993), citing *Penn Cent. Transp. Co.* v. *New York City,* 438 U.S. 104, 124-125, 130-131 (1978).

" ' Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Moskow v. Commissioner of Envtl. Mgt.,* 384 Mass. 530, 533 (1981), quoting, *Penn Cent. Transp. Co.* v. *New York City, supra* at 130-131. Rather, the proper focus is on the character of the action and the nature of the interference with the rights in the property as a whole. See *Steinbergh* v. *Cambridge, supra* at 742; *Moskow* v. *Commissioner of Envtl. Mgt., supra.* "When the claim is that government conduct, not amounting to a permanent physical occupation or confiscation of property, involves a regulatory taking, the analysis is peculiarly fact dependent, involving 'essentially ad hoc, factual inquiries.' " *Steinbergh v. Cambridge, supra* at 741, quoting *Penn Cent. Transp. Co. v. New York City, supra* at 124. Thus restrictions on a landowner's right to extract minerals from his property is not necessarily a regulatory taking when the property as a whole retains substantial value. See *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 496-497 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 296-297 (1981).

This court has repeatedly recognized that government regulations "may deprive an owner of a beneficial property use — even the most beneficial such use — without rendering the regulation [417] an unconstitutional taking." *Moskow* v. *Commissioner of Envtl. Mgt., supra,* quoting *Lovequist* v. *Conservation Comm'n of Dennis,* 379 Mass. 7, 19 (1979). See *Leonard v. Brimfield, supra* at 156. "Land use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property." *MacDonald, Sommer & Frates* v.

County of Yolo, 477 U.S. 340, 347 (1986). That an alternative, permissible use might be less profitable is not determinative. See *Penn Cent. Transp. Co.* v. *New York City*, *supra* at 124.

We conclude that the record before us does not support the ruling that a regulatory taking took place. The commission denied the plaintiff's proposal to mine thirty-two acres. This denial did not preclude less extensive sand and gravel operations. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, *supra* (no taking where regulation only restricted amount of coal which could be extracted). In fact, the commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals.[4] The denial of a particular plan cannot be equated with a refusal to permit any development. See *MacDonald, Sommer & Frates* v. *County of Yolo*, *supra* at 347.

Even if less extensive mining operations were not feasible, the record shows that the property has substantial value for alternative uses. The property is zoned in an agricultural district, which under the Falmouth zoning by-laws, allows for community [418] service, agricultural, and residential uses.[5]

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[4] It is possible that the plaintiff's proposal for sand and gravel operation is the only economically viable plan for the site, in which case its denial might constitute a regulatory taking. Because there has been no final determination regarding the nature and extent of the regulation in this case, "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests [have] been destroyed." *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 349 (1986), quoting *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 189-190 n.11 (1985). However, we need not speculate on this issue where there is clear evidence that the plaintiff owns more than a mineral estate and property has other valuable uses. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 296-297 (1981).

[5] There was ample evidence in the record to show that the property had substantial value even without a permit to remove sand and gravel.

There is no evidence in the record that the commission would oppose a residential development on the plaintiff's property. Indeed, the plaintiff contemplated residential use after removing the sand and gravel.

"Since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the 'after imposition' value, to know if a taking occurred . . . ." *Florida Rock Indus., Inc.* v. *United States,* 18 F.3d 1560, 1579 (Fed. Cir. 1994), cert. denied, 513 U.S. 1109 (1995). Because it is possible that less extensive sand and gravel operations may be approved and that the property has substantial economic value for other uses, we conclude that the findings of the judge do not support his conclusion that there was a taking.

The judgment is vacated and the matter is remanded to the Land Court for further proceedings consistent with this opinion.

APPENDIX B.

COMMONWEALTH MASSACHUSETTS

LAND COURT

DEPARTMENT OF THE TRIAL COURT

BARNSTABLE, SS.

MISCELLANEOUS
CASE NO. 215603

FRANCIS E. DADDARIO,
Plaintiff

vs.

THE CAPE COD COMMISSION,
Defendant

DECISION

Plaintiff Francis E. Daddario ("Plaintiff") filed a complaint for judicial review on March 1, 1995, pursuant to Chapter 716 of the Acts of 1989, as amended, An Act Establishing the Cape Cod Commission ("the Act"), and for declaratory relief pursuant to G. L. c. 185, § 1, and c. 231A, § 1 et. seq., and damages arising from the Cape Cod Commission's denial of a Development of Regional Impact permit involving certain property owned by Plaintiff in Falmouth. Plaintiff also alleges an unconstitutional regulatory taking of said property and requests that this court annul the decision of the Cape Cod Commission, approve Plaintiff's application and declare that the actions of the Cape Cod Commission are unlawful, unenforceable and a violation of Plaintiff's constitutional rights.

The trial commenced on January 29, 1996. It was held over six days and concluded on February 8, 1996. The proceedings were recorded and transcribed by a court-approved stenogra-

pher. Thirteen witnesses testified and sixty-one exhibits were introduced into evidence. All exhibits are incorporated herein by reference for the purpose of any appeal. A view of the subject property was taken by the court, in the presence of counsel, on April 1, 1996.

After reviewing the evidence and considering the pleadings filed by the parties, I make the following findings of fact.

1. Plaintiff is an individual residing at Plaza East, Apartment PHL, 4300 North Ocean Boulevard, Ft. Lauderdale, Florida.

2. Defendant Cape Cod Commission ("the Commission"), the planning and land use commission for Barnstable County, was established pursuant the Act, which became effective on or about January 16, 1990. The Commission has an address and principal place of business at 3225 Main Street, Barnstable.

3. By deed dated January 7, 1964, and recorded with the Barnstable Registry of Deed in Book 1245, Page 41, Plaintiff acquired title to three parcels of land containing approximately 52 acres in Falmouth. By separate deed dated April 24, 1964, and recorded in Book 1259, Page 436, Plaintiff acquired a fourth parcel, contiguous with one or more of the other three parcels, located on Thomas Landers Road in Falmouth. Plaintiff has been the sole owner of all four parcels since acquisition. The four parcels comprise the subject property ("Locus") in this action.

4. Locus consists of approximately 70 acres of vacant land in Falmouth. Locus is bordered to the north by Thomas Landers Road, a public way, and to the northwest by Shallow Pond. To the west, Locus is bordered by a sand and gravel mining operation and by land owned by the Town of Falmouth. To the south, Locus is bordered by a residential neighborhood of single family homes, and to the northeast Locus is bordered by another sand and gravel mining operation.

5. Under the Town of Falmouth Zoning By-Law ("the By-law") in effect presently and at the time of Plaintiff's petition, Locus is and was located in an AGA (agricultural) zoning district. Article XXIX of the Zoning By-law allows earth removal in an AGA zoning district upon the issuance of a special permit by the Town of Falmouth Board of Appeals.

6. On February 25, 1994, Plaintiff filed an application with the Town of Falmouth for the approval of a special permit for the Daddario Gravel Mining Operation ("the proposed project") to extract sand and gravel from Locus.

7. The proposed project calls for the extraction of sand and gravel in seven phases from areas referred to as "cells", each cell comprised of five acres or less. After extraction, each cell would be reclaimed through grading, loaming and seeding prior to commencement of work on the following phase, in accordance with the By-Law. The entire project is proposed with 200' buffer strips around the edges, as required by the By-Law.

8. The application for the proposed project was referred to the Commission by the Falmouth Zoning Board of Appeals on March 11, 1994, as a Development of Regional Impact ("DRI") of "outdoor commercial space greater than forty thousand square feet." Plaintiff submitted a DRI application form with requisite materials and application on June 28, 1994.

9. The 90-day period in which the Commission must conduct its public hearing was extended by agreement of the parties, and public hearings were held on August 2 and December 1, 1994.

10. After the public hearings, the Commission issued a decision dated February 2, 1995, denying Plaintiff's application for a DRI permit under sections 12 and 13 of the Act. The Commission concluded that the proposed project "would not enhance or protect open space on the site in a way that re-

spects the importance of sensitive natural resources of Cape Cod." Plaintiff appeals said denial in this case.

The Cape Cod Commission Act

11. The Commission was established because Cape Cod

> possesses unique natural, coastal, scientific, historical, cultural, architectural, archaeological, recreational, and other values; there is a regional, state and national interest in protecting, preserving and enhancing these values; and these values are being threatened and may be irreparably damaged by uncoordinated or inappropriate uses of the region's land and other resources.

St. 1989, c. 716, § 1 (a).

12. The Commission's purpose is to further

> the conservation and preservation of natural undeveloped areas, wildlife, flora and habitats for endangered species; the preservation of coastal resources including aquaculture; the protection of groundwater, surface water and ocean water quality as well as the other natural resources of Cape Cod; balanced economic growth; the provision of adequate capital facilities, including transportation, water supply, and solid, sanitary and hazardous waste disposal facilities; the coordination of the provision of adequate capital facilities with the achievement of other goals; the development of

> an adequate supply of fair affordable housing; and the preservation of historic, cultural, archaeological, architectural, and recreational values.

Id. § 1 (c).

13. The Commission is charged with preparing a Regional Policy Plan ("RRP"), the goal of which is to "present a coherent set of regional planning policies and objectives to guide development throughout said Barnstable County and to protect the region's resources, and which shall reflect and reinforce the goals and purposes set out in section one." Id. § 7 (a) .

14. The Commission is further charged with reviewing and regulating Developments of Regional Impact ("DRI"), pursuant to §1 (b) of the Act. A DRI is defined as a

> development which because of its magnitude or the magnitude of its impact on the natural or built environment, is likely to present development issues significant to or affecting more than one municipality, and which conforms to the criteria established in the applicable standards and criteria for developments of regional impact pursuant to Section 12.

Id. § 2 (h).

15. The Act further provides that any proposed industrial development comprised of outdoor commercial space greater than 40,000 Square feet is presumed to be a DRI. Id. § 12 (c) (6).

16. If a proposed development meets the standards and criteria for a DRI the Commission will review the proposed

development either by referral from a municipal agency or upon its own determination. once a municipal agency refers the proposed development to the Commission or receives notice of the Commission's intent to review, the municipal agency shall suspend its review of the application. Id. § 12(h).

17. The suspension of municipal agency review has the effect of extending "all constructive grant periods for municipal agencies for a period equal to the duration of commission review, such periods to resume running after a final commission decision is rendered." Id.

18. Upon the receipt of a proposed DRI, the commission is charged with reviewing the proposal for its consistency with the Act, the RPP and the local comprehensive plan. The Commission may approve the proposal if it finds that (1) the probable benefits from the project outweigh the probable detriments and (2) the project is consistent with the RPP, and the local comprehensive plan, and (3) the proposed development is consistent with the municipal development by-law. Id. § 13(d).

19. The Commission may approve, approve with conditions or disapprove a proposed DRI. If the commission disapproves a DRI, no further work may be done on the development. Id. § 13(e).

20. Section 13(f) of the act provides that

> Notwithstanding the provisions of subsection (d) of section thirteen, the commission shall approve or approve with conditions a development or regional impact where an applicant demonstrates that to disapprove the development of regional impact would constitute a taking of property in violation of the Massachusetts and United States Constitutions; provided, however, that no reasonably foreseeable danger to the

> public health or safety will arise from such approval or approval with conditions.

21. Any party aggrieved by a decision of the Commission regarding a DRI may appeal the Commission's decision to the Barnstable Superior Court or the Land Court. Id. § 17(b).

22. Pursuant to section 17(d) of the Act, this court is directed to

> hear all evidence pertinent to the authority of the commission and determine the facts, and, upon the facts as so determined, annul such decision if found to exceed the authority of said commission or make such other decree as justice and equity may require.

This standard is identical to that found in G. L. c. 40A, § 17 for judicial review of decisions of a board of appeals or special permit granting authority. In such instances "no special weight attaches to either the conclusions of law or findings of fact of a board of appeals on judicial review. . . . The trial judge hears the matter de novo and 'determines the legal validity of the decision of the board upon the facts' which the judge finds." Needham Pastoral Counseling Center Inc. v. Board of Appeals of Needham, 29 Mass. App. Ct. 31, 32 (1990), (citing Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 295 (1972)).

The Regional Policy Plan

23. Pursuant to the Act, the RPP was duly approved by the Barnstable County Assembly of Delegates and became effective September 6, 1991.

24. The RPP, a planning and regulatory document, establishes review and regulatory policies applicable to DRIs. The

RPP provides Minimum Performance Standards ("Standards") which set forth mandatory minimum standards for future development.

25. The RPP explains that if an applicant demonstrates that the interests protected by a given Standard are better served by an alternative approach, the Commission may modify the application of said Standard. Regional Policy Plan, p. 9. In this instance, the Commission made no such modifications.

26. The parties have stipulated that the language of the Commission's decision (Exhibit 1) notwithstanding, the proposed development is consistent with all applicable Standards except the following: 2.1.1.2 A.2; 2.1.1.3; 2.4.1.1 B.1; 4.1.1.1; 4.1.1.2; 4.1.1.3; 4.1.2.1; 4.2.2.3; 4.3.1.1; 6.1.1; 6.1.4; and 6.1.5.

27. Standards 2.1.1.2 A.2, 2.1.1.3 and 2.4.1.1 B.1 all deal with the protection of natural resources, specifically water resources, wildlife and plant habitat, as follows:

> a. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted. RPP
>
> Standard 2.1.1.2 A.2
>
> b. Development and redevelopment shall identify proposed wells and existing private wells on abutting properties within 400 feet and assess the impact of the development on the water quality of these wells. Septic systems shall be sited so as to avoid contamination of existing or proposed wells. RPP Standard 2.1.1.3.

c. Applications for Developments of Regional impact that propose to alter such areas shall contain a wildlife and plant habitat assessment. Such assessments shall identify the presence and location of wildlife and plant habitat, including vernal pools, and be a guide for the layout of the development. Developments shall be planned to minimize impacts to vegetation and wildlife. RPP Standard 2.4.1.1 B.1.

28. Standards 4.1.1.1, 4.1.1.2, 4.1.1.3, 4.1.2.1, 4.2.2.3, and 4.3.1.1 relate to community facilities and services including transportation, solid and hazardous waste management and capital facilities and infrastructure, as follows:

a. Development and redevelopment shall not degrade the existing levels of service (LOS) of surrounding roads and intersections . . . . Where existing levels of service are below these specified levels, development and redevelopment shall maintain or improve performance indicators . . . . RPP Standard 4.1.1.1.

b. Developments of Regional Impact shall mitigate any traffic impacts that are created by such developments. The mitigation strategies shall include both structural and nonstructural improvements, with special emphasis on alternatives to private automobile transportation. Necessary improvements shall occur concurrently with any development, or a contribution of funds toward the necessary improvements shall be provided . . . . RPP Standard 4.1.1.2.

c. Development and redevelopment shall comply with permissible forms of mitigation . . . [which] take into account not only road function and classification

but the presence of environmentally sensitive areas, regional economic impacts and scenic and historic values .... RPP Standard 4.1.1.3.

d. Developments of Regional Impact shall make provisions for alternate transportation modes to offset at least 20% of their projected traffic volumes. . . . In lieu of providing these services in-kind, the developer may make a contribution to the Cape Cod Regional Transit Authority or a private transit company approved by the Commission in order to provide public transportation. RPP Standard 4.1.2.1.

e. Commercial and industrial development and redevelopment that involves the use, treatment, generation, storage or disposal of hazardous wastes or hazardous materials, with the exception of retail sales and household quantities, shall not be permitted within Wellhead Protection Districts. RPP Standard 4.2.2.3.

f. Approval of development and redevelopment which increases the intensity of use shall be based on existing infrastructure capability or on a development's ability to provide for or contribute the infrastructure and services necessary to support it. RPP Standard 4.3.1.1.

29. Standards 6.1.1, 6.1.4, and 6.1.5 relate to the preservation and availability of open space:

a. Development or redevelopment within the Capewide Open Space/Greenbelt network . . . shall maintain its integrity by clustering away from sensitive resources and maintaining a continuous corridor to

preserve both edge and interior wildlife habitat. RPP Standard 6.1.1.

b. Commercial development which qualifies as a Development of Regional Impact shall provide 40% of the lot area excluding wetlands, as permanent open space including landscaped areas designed to screen and buffer the development . . . . Where appropriate, open space may be provided off site within the same town, or a contribution of funds may be made to the town for open space acquisition. . . . RPP Standard 6.1.4.

c. In the design of developments, significant natural and fragile areas including critical wildlife and plant, water resources . . . and significant land forms shall be protected. RPP Standard 6.1.5.

The Falmouth Zoning By-Law

30. Article XXIX of the By-Law, Earthmoving Regulations, requires a special permit for such operations. Falmouth Zoning By-Law, § 240-150. Said special permit applications are subject to the procedures outlined in Article XXXXII of the By-Law, the Special Permit Procedures.

31. Earthmoving regulations require that a border bufferstrip of at least 100 from the side line of any road and 200 from all abutting property lines be provided, unless written consent of the abutting property owner has been received by the Board. Id. § 240-154B. Said regulations also require reclamation by grading, reloaming and seeding. Id. § 240-154 0(l)-(4). In addition, security in the form of a cash deposit or

surety bond must be posted with the Town Treasurer to secure compliance with the reclamation requirements. Id. § 240-155.

32. Article XX of the By-Law, Wildlife Corridor, applies to any project requiring a special permit, and serves to "establish and protect permanent and contiguous corridors and special areas for feeding, breeding and normal home range movement of wildlife through the defined habitat. Id. § 240-91.

33. The Wildlife Corridor By-Law requires that the applicant establish contiguous corridors with a minimum width of 300' across the subject site and to adjacent parcels and corridors. It also requires that natural, indigenous vegetation be encouraged or enhanced by the project and requires that disturbed areas be revegetated. Finally, it discourages "dramatic" changes in topography. Id. §§ 240-94 A(2), A(5) and A(6).

As stated above, § 13(f) of the Act states in substance that where the applicant demonstrates that disapproval of the DRI would constitute a taking of property in violation of the Massachusetts and United States Constitutions, the Commission shall approve or approve with conditions the DRI, "provided no reasonably foreseeable danger to the public health or safety will arise from such approval . . . ."

I find no competent evidence of any reasonably foreseeable danger to the public health or safety arising from the approval of the DRI or of its approval with conditions. Having so found I next consider whether or not the disapproval constitutes a taking in violation of the Massachusetts and/or United States Constitution.

The pertinent language of the Massachusetts Declaration of Rights, Article X, is as follows "but no part of the property of any individual can, with justice be taken from him, or applied to public uses without his consent . . . and whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable

compensation therefore. . . ." The United States Constitution states somewhat more simply in Amendment V "nor shall private property be taken for public use, without just compensation."

Clearly the objectives of the commission and their actions in denying the DRI were and are a sincere effort to protect the public interest.

> There can be no doubt today that every effort must be made . . . to protect our natural heritage and to pass it to future generations unspoiled. The destruction of ancient civilizations by human misuse of the environment, . . . teaches the need for public policies that work with the natural environment rather than attempt radically to alter it. The question at issue here, is when the Government fulfills its obligations to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner or is it to be shared by the community at large.

Loveladies Harbour, Inc. v. U.S., 28 F.3d 1171, 1175 (Fed. Cir. 1994). Clearly under the law today the costs of such preservation and protection must be shared by all property owners not just the relatively few whom the policy happened to adversely impact. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) ; Agins v. Tiburen, 447 U.S. 255, 260 (1992) ; Loveladies, 28 F.3d at 1175; Florida Rock Industries, Inc. v. U.S., 18 F.3d 1560 (Fed. Cir. 1994).

Nor is a taking 1imited to situations where all economic benefit or viability is lost, because a partial loss, as opposed to a "mere diminution", can also be a taking. Florida Rock Industries, Inc., 18 F.3d at 1590. Loveladies sets forth certain

criteria which, if met, will establish a regulatory taking. Such criteria as here applicable are as follows.

First, there has been a denial of economically viable use of the property as a result of the regulatory imposition. Here Plaintiff seeks to operate a sand and gravel operation in seven phases with each phase involving approximately five acres, or a total of about thirty-five acres, on Locus which contains seventy acres. Each phase is to be reclaimed in compliance with the zoning by-law before work is begun in the next. The denial of the DRI has precluded such use.

I find that prior to the Commission's actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none. I base this finding on the testimony of Plaintiff and his expert, Dr. Cochrane. Plaintiff is not only the owner of Locus, he is also a successful businessman well versed in the construction and sand and gravel business. I do not find it necessary herein to determine precise before and after values, as the remedy provided for by the act is not money damages but, most likely in an effort to avoid such payments, grant of the requested relief. I do find that even though Locus may still have substantial value for other development, the magnitude of the financial loss, as supported by the evidence, and the loss of an owner's right to use his property as he wishes, certainly demonstrate that the action of the Commission has crossed the line from a noncompensable "mere Diminution" to a compensable taking.[1]

It must also be determined that the loss of rights and value is directly attributable to the actions of the Commission and not other legal or regulatory impediments, that the land is otherwise usable. Lopes v. Peabody, 417 Mass. 299, 306 (1994). The only such impediment herein involved is the Zoning By-

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[1] I note the Act does not differentiate between taking and compensable taking, a difference that is herein moot for reasons stated.

Law of the Town of Falmouth under which the original petition was filed. It would appear from § 12(h) of the Act, above quoted, that after a DRI permit is finally acted upon the matter is returned to the local municipal agency which proceeds with the processing of the application. It further appears that failure of the local agency to so act may well result in a constructive grant.[2] The filing of the denial was a final action; however, in this instance and acting on advice of the Commission, the Board has refused to act despite the request of Plaintiff. Interestingly the Commission advised the Board that it could act to deny the application, but could not approve it, as such action would be "working on the project" a somewhat strained interpretation of the above section.

Inasmuch as the failure of the Board to act is directly attributable to the Commission, I find and rule that the Commission may not raise the lack or necessity of action by the Board as defense to the taking claim.[3] Moreover, after a review of the proposal and the By-law, there appears to be a reasonable likelihood that the special permit will issue.

The second test is that the property owners had a distinct investment-backed expectation. It is uncontroverted that when Mr. Daddario purchased locus over thirty years ago he did so as a future investment. Considering the testimony and the fact that he and his father before him were successful contractors, the location of Locus, and use made thereof, I find that such acquisition was done with an investment-backed expectation.

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[2] It appears in this matter that a constructive grant by the Board of appeals may have resulted from its non-action. For some reason not appearing herein, there is no record of Plaintiff attempting to perfect such remedy under c. 40A, § 9, perhaps because the remedy therein in the case of "no action" as opposed to no action after hearing, is somewhat unclear, to say the least.

[3] The language of § 13(f) "notwithstanding the provisions of subsection (d)" may obviate the consideration of the Zoning By-Law.

Lastly, the interest vested in the owner must be a matter of state property law and not within the power of the state to regulate under common law nuisance doctrine. Although a sand and gravel pit is probably a less than desirable activity to residential neighbors, the fact is that Locus is abutted by two sand and gravel operations and a concrete batching plant. Moreover, there are or have been other such operations in the general vicinity. Sand and gravel are valuable commodities much in demand for projects, both public and private, including capital facilities and affordable housing, throughout the Commonwealth, a fact recognized by the Town in establishing its Earth Removal By-law with which Plaintiff must still comply. Accordingly, I find that Plaintiff's rights in Locus vest as a matter of property law, and not within the power of the state to regulate under common law nuisance doctrine.

In consideration of the foregoing I find that the action of the Commission in disapproving the proposed DRI constitutes a taking of property in violation of the Massachusetts and United States Constitutions and accordingly order the Commission to approve the DRI with conditions. Such conditions are limited to those standards stipulated to herein. Such conditions as may constitute a "taking" or contribute thereto are of course excluded.

Upon a reading and analysis of all the evidence pertinent to the authority of the Commission, as set forth in detail below, I find that some of the disputed Standards set forth in the parties, stipulation do not apply to the proposed project and shall not be included as conditions of the approval. Other standards are satisfied and conditions may be imposed to insure their compliance. It further appears doubtful that some of the remaining standards satisfy the "rough proportionality" standard established by the Supreme Court in Dolan v. Tigard, 114 S. Ct. 2309, 2319-20 (1994), which requires that the regulatory agency "make some sort of individualized determination

that the required dedication is related both in nature and extent to the impact of proposed development."

I find that Plaintiff's proposed project complies with Standards 2.1.1.2 A.2 and 4.2.2.3 dealing with the storage of hazardous materials on the site, inasmuch as Plaintiff will use a service to fuel their vehicles on site as necessary, alleviating any need for storage. The approval may be conditioned on continued compliance with these Standards.

Plaintiff is not Proposing to install septic systems or put materials into the ground. In light of this and Plaintiff's commitment not to store petroleum or hazardous products on site, I find that there is no foreseeable circumstance in which the proposal will adversely impact water quality, and, accordingly, Standard 2.1.1.3 is not applicable.

I further find that Standard 2.4.1.1 B.1, which calls for the completion of a wildlife and plant habitat assessment, has been satisfied by the proposal, as Plaintiff has supplied the required assessment to the Commission.

This standard also sets forth the additional requirement that the development be planned to minimize impacts to wildlife and plant habitat. In this regard, the Commission rejected Plaintiff's plan and proposed an alternative configuration which would allow plaintiff to extract sand and gravel from 25 acres of the 70 acre locus (35% of his property). I find that such requirement as applied to this case would appear to constitute a taking and may not be a condition. The foregoing notwithstanding, I further find that Plaintiff's proposal which includes phasing, restoration, and the creation of buffer zones around wetlands resources and along the perimeter of the site, balances the need to minimize detrimental impacts to habitat while allowing Plaintiff to effectively mine his property in the appropriate locations and complies with this Standard.

Similarly, Standard 6.1.1 requires developments in the Capewide Open Space/Greenbelt network to cluster develop-

ment away from sensitive resources and maintain a continuous wildlife corridor. I find this standard incongruous with the proposed project, especially in light of the fact that the Commission proposed that the Plaintiff "cluster" his mining activity in areas that may not be productive. While such requirement is an obvious incursion on Plaintiff's property rights, I find that by phasing the proposal and establishing buffer zones, a significant portion of Plaintiff's property will remain as undisturbed open space throughout the duration of the mining activity and more than meets any legal obligation of Plaintiff.

Standard 6.1.5 requires developments to protect significant natural and fragile areas and land forms. I find that the proposed buffer zones around these wetland resources is sufficient to protect against adverse impacts. Regarding the protection of significant land forms, I again find this requirement irreconcilable with the use Plaintiff has proposed for his property, and must be excluded.

Regarding the aforementioned Standards designed to protect habitat and wildlife, I find that the Commission's approval may be conditioned on regular inspections of the buffer zones to insure compliance.

I find that while such requirement certainly falls into the taking category, Plaintiff has met Standard 6.1.4, requiring the dedication of 40% of the lot area excluding wetlands as permanent open space. Plaintiff proposes to mine approximately 50% of locus, and naturally, he proposes to mine the 50% which he believes will be the most productive sources of sand and gravel. I find the Commission is unreasonable in dictating which areas Plaintiff must leave as open space, without offering compensation for said areas. Furthermore, I find no Legislative authority giving the Commission jurisdiction to determine which 40% a DRI applicant must set aside. I also note that this Standard applies to "commercial" developments and

suggest that sand and gravel mining is not such a development.

Finally, I find that the Standards falling under Section 4 of the RPP regarding transportation and capital facilities are not applicable to the proposed project for the following reason.

Standard 4.1.1.1 requires that proposed developments shall not degrade existing levels of service of surrounding roads. Conflicting testimony was presented regarding the potential of such impacts, but in the worst case scenario which I do not accept, the proposal would have a marginal effect on only one intersection. I find that credible evidence was presented to show that the worst case scenario would not or most likely not be realized, and thus I find that the proposed development satisfies said Standard. As a result of this finding, the approval may not be conditioned on the Commission's earlier requirement pursuant to Standards 4.1.1.2, 4.1.1.3, 4.1.2.1 and 4.3.1.1 that Plaintiff donate a $40,000 "fair share contribution" for traffic impact mitigation and $12,400 to fund alternative transportation to offset traffic volumes.

Approval of the DRI may be conditioned on compliance with Sections 2.1.1.2 A.2 and 4.2.2.3, and periodic inspections of the required buffer zones. No further conditions may be added to such approval.

Judgement Accordingly.

/s/

Robert V. Cauchon
Chief Justice

Dated: June 14, 1996

APPENDIX C.

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

V. Douglas Errico, Esquire
Marcus, Goodman, Emmer & Brooks, P.C.
45 Braintree Hill Off. Park #107
Braintree, MA 02184

RE: No. SJC-07329
FRANCIS E. DADDARIO
vs.
THE CAPE COD COMMISSION

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: August 5, 1997

To: V. Douglas Errico, Esquire
Eric W. Wodlinger, Esquire
Jerold S. Kayden, Esquire
Jeffrey M. Bernstein, Esquire
Madeline Morris, A.A.G.
R. Jeffrey Lyman, Esquire
Atty. Paul W. Edmondson
Land Court

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
CLERK

No. 97-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

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No. 97-632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Petitioner's statement of "Material Facts" overlooks or misstates several important points. The first and most critical of these is that the Cape Cod Commission ("Commission") denied the Petitioner only the specific mining project proposed to the Commission. The Petitioner does not identify any aspect of the Commission's decision, or the Regional Policy Plan (which guided the Commission's review process), that prohibits the Petitioner from extracting sand and gravel from his property. Despite the Petitioner's urgings, the Supreme

Judicial Court did not accept the Petitioner's argument that the mining configuration he proposed is the only viable means of extracting sand and gravel from his property. *Daddario v. Cape Cod Comm'n*, 425 Mass. 411, 417 (1997) (*see* Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 9a).

The Petitioner instead argues that the alternative proposals advanced by the Commission's staff during the review process were "facially infeasible," because those proposals called for mining within the 200-foot buffer required by the Falmouth bylaw. (*See* Pet. at 5.) However, as noted by the Supreme Judicial Court in its decision, this buffer requirement can be waived with the assent of the applicant's abutter. (*See* Pet. App. at 3a n.1.) The Petitioner omits the fact that he did not even attempt to obtain this consent from his abutter,[1] thereby undermining any arguments he makes about the feasibility of the Commission's proposals.

The Petitioner claims that his estimate of the value of his land for sand and gravel use was "unchallenged." (Pet. at 6.) Not even the trial judge adopted the landowner's evidence as to value. The Commission's evidence, from a professional geologist and a real estate appraiser, indicated that (a) in the absence of any geological borings to establish the quantity and quality of the reserve, the economic feasibility of mining was speculative, (b) a prudent investor would not pay for unproven reserves, and (c) the highest and best use of the property was residential. The trial judge made no findings as to (a) the value of the property for mining, or (b) specific "before" and "after" values.

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[1] The property abutting this portion of the Petitioner's property is also a sand and gravel pit. Quite logically, the Commission's staff concluded that the buffer requirement made little sense where adjoining properties would both involve sand and gravel mining, and left it to the Petitioner to obtain the consent of his abutter to waive the buffer requirement. The Petitioner, having previously sued this abutter to block a special permit for mining sand and gravel, was apparently unwilling to request that waiver.

The Petitioner asserts incorrectly that the Supreme Judicial Court failed to consider his argument that "he owned a separate and distinct mining estate recognized for takings purposes by state law." (Pet. at 6-7.) The Supreme Judicial Court specifically considered and rejected that position, stating that the taking analysis must consider "the property as a whole." (Pet. App. at 8a.) Significantly, the Supreme Judicial Court relied on this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978), to support rejection of the Petitioner's argument on this issue. As the Petitioner holds fee simple title to his property, the facts of this case raise no compelling reason why this Court should review the established precedent of *Penn Central*.

Finally, the Petitioner fails to mention the current status of this case in the trial court. Following the remand by the Supreme Judicial Court, the Petitioner requested the trial court to conduct further fact-finding on several issues relating to his taking claim, including the value of his property before and after the Commission's decision. In light of this request, the trial court instructed the parties to brief the issues before the trial court as a result of the remand. In response, the Commission has argued that the sole remaining issue is the Petitioner's statutory appeal challenging the validity of the Commission's decision under its organic act, a claim left unaddressed by the trial court. The Petitioner, however, argues in his brief to the trial court that the Supreme Judicial Court's decision adjudicated at most only his "categorical" taking claim, leaving him free to submit additional evidence of a partial taking under the "ad hoc" factors enumerated in *Penn Central*, 438 U.S. at 124. A copy of the Petitioner's brief to the trial court is attached in the appendix hereto.

REASONS FOR DENYING THE WRIT

I. The Massachusetts Supreme Judicial Court's ruling that the Petitioner's "taking" claim was without factual or legal basis follows this Court's prior holdings.

There is simply no merit to the Petitioner's claim that a taking has occurred, and hence there is no reason for this Court to grant his petition. The Commission's denial of a single application to mine sand and gravel did not effect any of the types of takings under this Court's prior decisions. This is evident from the Supreme Judicial Court's ruling that the trial court's decision lacked sufficient findings to support the Petitioner's claim.

The governmental action here cannot be characterized as a "categorical" taking. *Cf. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The Petitioner does not claim a physical intrusion upon his property, nor a required dedication of land for public use. *Cf. Dolan v. Tigard*, 512 U.S. 374, 388-89, 394-95 (1994) (dedication of public easements for floodplain greenway and pedestrian/bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836-39 (1987) (grant of easement for public access to private beach); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-39 (1982) (cable TV box installation on private apartment building).

Nor is this an instance where government regulation has deprived the property owner of "all economically beneficial or productive use of land," amounting to a *per se* categorical taking. *Cf. Lucas*, 505 U.S. at 1015 (barrier beach statute preventing any construction on landowner's property). The Supreme Judicial Court found that (a) in denying the Petitioner's specific proposal to mine sand and gravel from thirty-two acres, the Commission neither prohibited mining nor pre-

cluded less extensive mining, and (b) the property had substantial value for other uses, including residential development (allowed as-of-right under Falmouth's zoning).[2] (Pet. App. at 9a.) Even the trial judge acknowledged that the property "may still have substantial value for other development." (Pet. App. at 24a.)

Thus, the Petitioner is not a landowner who "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle[.]" *Lucas*, 505 U.S. at 1019 (emphasis in original). The Petitioner nonetheless attempts to recast his claim as a categorical taking by arguing that, regardless of the remaining value of the property as a whole, he has been deprived of all economic value of his "mining estate," which he proposes as the property interest "denominator" against which he would measure the loss of value. The Petitioner contends that his case furnishes this Court with an opportunity to resolve what he perceives to be conflicts and inconsistencies in the decisions of Circuit Courts, state courts, and this Court itself as to the definition of the property interests at stake in takings cases. (Pet. at 8-11.) Neither contention has merit.

First, the Petitioner's characterization of his property interest as a separate "mineral estate" ignores the true nature of his title. The Petitioner owns the entire fee simple title to his land (acquired in 1964, thirty years before he applied for a special permit for sand and gravel mining). This case does not involve an attempt to exercise mineral rights acquired separately from the underlying title; there simply is not, and never was, a separate "mineral estate."[3] As both the trial court and the Su-

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[2] Such development might not be subject to review by the Commission, which reviews only development activity that exceeds specified thresholds. (*See* Pet. App. at 15a-16a.)

[3] The Petitioner's fee simple absolute comprehends subsurface, surface, air, and water rights, and any other beneficial interest appurtenant to the land.

preme Judicial Court perceived, what the Petitioner describes as his "mineral estate" is simply his desire to use the property in a particular manner, and to a particular extent, when many other options are available to him.[4]

Second, by considering the value of the property as a whole when evaluating the Petitioner's takings claim, the Supreme Judicial Court followed this Court's prior holdings. In *Penn Central*, 438 U.S. at 130-31, this Court rejected the argument that the airspace above Grand Central Terminal should be considered as a separate and discrete property interest:

> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."

In later decisions, this Court has reiterated that property rights (whether real, personal, or intangible) are to be viewed "as a whole" when analyzing regulatory taking claims. *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-645 (1993) (no tak-

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[4] Furthermore, in order to review the State's decision on the Petitioner's claim, based upon the supposed existence of a separate mineral estate, this Court would necessarily have to determine the extent to which the property law of Massachusetts recognizes and protects mineral rights as a separate property interest, a topic that was not addressed by the Supreme Judicial Court.

ing found where pension-plan liability imposed on withdrawing employer is 46% of net worth); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-8 (1987) (coal required to be left in place not defined as separate segment of property for taking analysis); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (where owner possesses full "bundle" of property rights, destruction of one "strand" not a taking, because aggregate must be viewed in entirety); *see also Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (regulatory deprivation of single use of real property must be considered in light of remaining use of property as a whole); *cf. Loretto*, 458 U.S. at 435 (permanent physical occupation is most serious invasion of property interests, because government takes not a single strand, but a "slice of every strand" from bundle of property rights).

The Petitioner seeks support for his claim in the discussion of the "denominator" problem in *Lucas*, 505 U.S. at 1016-17, n.7. Although Footnote 7 raises the possibility of separable property interests, it does not reject the *Penn Central* formulation; it merely suggests that the selection of a denominator might depend on "how the owner's reasonable expectations have been shaped by the State's law of property." In view of the full array of property interests inhering in the Petitioner's fee simple absolute and the availability of valuable alternative development possibilities, the question raised in *Lucas*'s footnote 7 finds as little application here as it did in *Lucas*.

Seeking case support, the Petitioner points to two Circuit Court decisions that he asserts recognize the existence of a separate mineral estate. He asks this Court to adopt and apply his interpretation of those cases, thereby reversing the Supreme Judicial Court's "inconsistent" decision. The Respondent respectfully suggests (a) that the value of the non-mineral estate in those cases was so insubstantial as to negate any comparison to Petitioner's land, and (b) that if this Court had

been inclined to review those two decisions, it would have allowed writs of certiorari, a step that it declined to take. *See Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, 502 U.S. 952 (1991).

The Petitioner's "mining estate" argument is undercut by a factual flaw as well. The Supreme Judicial Court expressly concluded that the Petitioner has not lost the ability to mine sand and gravel from his land as a result of the Commission's decision. (Pet. App. at 9a) ("This denial did not preclude less extensive sand and gravel operations."). Only a single, particular plan of excavation was rejected. Nothing in the Regional Policy Plan prohibits sand and gravel mining. The Petitioner is free to seek a permit for a differently configured mine. There is neither a factual nor a legal basis for a claim of a categorical taking, regardless of the denominator.

Because the Commission did not effect a categorical taking by denying all economically beneficial or productive use of the Petitioner's land, the Supreme Judicial Court considered whether government regulation nonetheless so affected the use of the land as to amount to a taking. That court applied the factors identified in *Penn Central*: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." (Pet. App. at 7a) (*quoting Penn Central*, 438 U.S. at 124). The court recognized that the analysis of regulatory taking claims is fact dependent, involving "essentially ad hoc, factual inquiries." (Pet. App. at 8a) (*quoting Penn Central*, 438 U.S. at 124). Looking primarily at the economic impact of the regulation, the Supreme Judicial Court concluded that the record did not support the trial judge's finding of a taking, because the property retained "substantial value." The Commission's rejection

of the Petitioner's particular plan did not foreclose other sand and gravel operations; the Commission's staff displayed a willingness to allow less extensive operations, and indeed, proposed alternative plans (one that the Petitioner declined to consider would have allowed sand and gravel extraction on twenty-five acres, in comparison with the thirty-two acres desired by the Petitioner). (Pet. App. at 9a.) Furthermore, evidence at trial supported the Supreme Judicial Court's finding that the property had substantial value for other uses allowed of right under municipal zoning, including residential development.[5] Although the trial judge made no finding on the property's value before and after the Commission's rejection of the Petitioner's proposal, the Supreme Judicial Court concluded that the property retained substantial value for uses other than sand and gravel mining, and that the record did not support the trial judge's ruling that a regulatory taking had occurred. *Id.*

The Supreme Judicial Court did not address the remaining "prongs" of the *Penn Central* test, but if the court had done so, the results would have reinforced its conclusion. The Commission's decision did not unreasonably interfere with the Petitioner's "distinct investment-backed expectations." The Petitioner asserts that he acquired the property in 1964 for the primary purpose of mining (Pet. at 4), but leaves unexplained the thirty-year delay before he sought a permit to carry out that activity. Assuming that the Petitioner also hoped to benefit from appreciation in land values, that expectation has been amply fulfilled. He purchased the property for about $45,000, and shortly thereafter recouped his initial investment by selling a small portion of the property for that same price. The

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[5] The Commission's appraisal expert testified that the property was worth $550,000 to $600,000 if devoted to residential use. The Petitioner's expert testified that the property would be worth $465,000 even if limited to use as conservation land. As of 1996, the property's assessed value for taxation was $474,600.

property's current value, even if the land is not used at all for sand and gravel mining, is ten to thirteen times the Petitioner's initial investment.[6] *See supra* at n.5. The Commission's decision does not prevent the Petitioner from profiting from his ownership and obtaining a reasonable return on his investment. *See Penn Central*, 438 U.S. at 136; *see also Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (*Florida Rock II*) (taking analysis should consider impact of regulation on owner's opportunity to recoup investment).

Furthermore, the Petitioner should have expected, when he purchased the land, that sand and gravel mining would be subject to government regulation. Although the Commission did not exist in 1964, the type of land-use regulation at issue here is hardly novel. Massachusetts has long authorized municipal zoning as well as general town by-laws regulating sand and gravel mining. *See* Mass. G.L. c. 40, § 21, cl. (17) (1996); *Butler v. East Bridgewater*, 330 Mass. 33, 36-37 (1953) (upholding municipal bylaw regulating sand, gravel, soil, and loam removal); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 592-96 (1962) (town by-law barring earth excavation not a taking). The Commission's review of developments of regional impact to ensure their conformance to the county-enacted Regional Policy Plan is comparable to forms of municipal land-use regulation which predated the Petitioner's property acquisition.

Analysis of the third *Penn Central* factor, "the character of the government action," also supports the conclusion that no regulatory taking has occurred. The government activity here is not comparable to the examples offered in *Penn Central*, in

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[6] After he purchased the property but before the Petitioner applied for the sand and gravel mining permit, he had modest expectations for the value of the property. In 1989, he sought and obtained an abatement of the property's assessed value. The valuation was reduced from $770,000 to $304,000, well below the 1996 assessed value and the current value estimates discussed *supra* at n.5.

which government agencies undertook periodic physical intrusions, including overflights, gun firings, and floodings, that effectively resulted in the property being "taken" for public purposes. *Penn Central*, 438 U.S. at 124, 128.

The Commission's denial of the Petitioner's mining proposal cannot be characterized as a regulatory taking, when that decision is measured against each of the possible categories of takings that this Court has established. A landowner does not prove a taking simply by showing that he has filed a single unsuccessful application to exploit a property interest that he previously believed to be available for development. *Penn Central*, 438 U.S. at 130. The Supreme Judicial Court correctly concluded that the Petitioner's constitutional rights had not been violated. The Petitioner's taking claim is without merit, and his petition for a writ of certiorari should be denied.[7]

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[7] This Court recently declined to review another Supreme Judicial Court decision in which that court rejected a taking claim after subjecting it to the *Penn Central* factor analysis. *See Leonard v. Brimfield*, 423 Mass. 152, *cert. denied*, ___ U.S. ___, 117 S. Ct. 582 (1996) (upholding special permit that limited construction in a flood plain zone, effectively limiting construction to six of sixteen acres owned).

II. The Petitioner's taking claim is not ripe, and consideration of the claim by this Court would be premature and unnecessary, because the Petitioner, having neither exhausted his state-law remedies nor sought approval of alternative designs, has not established the degree to which uses of his property have been restricted by government regulation.

As the Commission argues *supra*, this Court should deny the Petitioner's petition for a writ of certiorari because it finds no support in this Court's prior decisions on regulatory takings. Even if this Court were to find that the Petitioner's claim had substantive merit and raised significant unresolved constitutional issues, this Court should still deny the petition, because the claim is not yet ripe for this Court's review. There are several reasons why consideration of the claim now would be premature.

(a) The Petitioner has not exhausted the state-law remedies available to him for relief from the Commission's decision. Section 17(b) of the special act establishing the Commission provides a right of judicial review to any party "aggrieved by a commission decision on a development of regional impact." (Pet. App. at 6a.) The Petitioner's complaint raises both a statutory § 17 challenge to the Commission's decision and a constitutional taking claim. The trial judge never decided the § 17 appeal, relying instead on his taking analysis to overturn the Commission's decision. The Supreme Judicial Court rejected the taking claim (for lack of ripeness as well as lack of substantive merit), but did not address the § 17 claim, and instead remanded the case for further proceedings. Therefore, the Petitioner retains his statutory appeal, notwithstanding the Supreme Judicial Court's adjudication of his taking claim, and could still prevail on non-constitutional grounds. This Court need not consider an appeal on constitutional grounds before a

final decision has been reached on the Petitioner's statutory claim for relief. *See Williamson Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 187-88 (1985) (claim not ripe where landowner failed to seek variances after proposed plat rejected); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (claim not ripe where property owners failed to request variances or waivers from requirements of surface mining act).

(b) Even if the Petitioner loses his statutory challenge to the Commission's decision, the Commission's rejection of one mining proposal still leaves open the possibility that it would approve a differently configured mining plan. There is more than a hypothetical possibility that the Petitioner's property retains substantial value for the very use that he proposes. As the Supreme Judicial Court noted:

> "[T]he commission's staff proposed a plan which would have permitted sand and gravel extraction on twenty-five acres, but the plaintiff declined to consider this alternative or modify his proposal. While not conclusive, the staff's plan demonstrated a willingness to permit less extensive mining proposals."

(Pet. App. at 9a.) It is therefore premature for the Petitioner to claim a "categorical taking of his mining estate" (Pet. at 8) and to assert that his claim provides an opportunity for this Court to address the "denominator" question discussed in *Lucas*, 505 U.S. at 1016 n.7. Because the Petitioner's property may still retain substantial value for both sand and gravel extraction and residential development, his categorical taking claim is neither

ripe nor valid, regardless of whether the affected property is the "mining estate" alone or the property as a whole.[8]

(c) Assuming, *arguendo*, that the Commission would not approve any sand and gravel mining operation (or would only approve one that was, by some measure, economically unfeasible), the record is insufficient to establish either the "pre-regulation" value of the property for sand and gravel mining, or the "post-regulation" remaining value of the property for other uses. The trial judge did not find these values, and the Petitioner did not object to the lack of these findings or cross-appeal to the Supreme Judicial Court. The Commission has not been presented with alternative development plans for the site for uses other than sand and gravel extraction,[9] and so it cannot be determined what other uses would be allowed[10] or what values might flow from those uses. As this Court has stated:

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[8] *See MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-53 & n.8, n.9 (1986) (claim unripe, because rejection of subdivision plan left open possibility that less intensive development would be permitted); *Good v. United States*, 1997 WL 528955, at *19 (Fed.Cl. Aug. 22, 1997) (ripeness doctrine requires good faith effort by developers to satisfy permitting agency after initial denial, reflecting reality that land development often involves process of negotiation); *Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 98 (2d Cir. 1992) (claim not ripe where agency's rejection of subdivision proposal did not preclude submission of another plan for less intensive development located in less critical areas of property, and where agency's decision indicated receptivity to a revised proposal). *Cf. Suitum v. Tahoe Regional Planning Agency*, ___ U.S. ___, 117 S. Ct. 1659, 1662-63, 1667 (1997) (claim ripe where agency had determined that landowner's property could not be developed or used for any productive purpose).

[9] The Petitioner's "futility" argument deserves short shrift for this very reason. It was the Petitioner, rather than the Commission, who refused even to consider alternative mining plans.

[10] As noted *supra* at n.2, not all types or degrees of development would require Commission approval, because the Commission reviews only those projects that exceed the thresholds for developments of regional impact.

> "[I]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a *final and authoritative determination of the type and intensity of development legally permitted on the subject property.* A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (emphasis added); *see also Williamson*, 473 U.S. at 191 (*Penn Central* factors cannot be evaluated until agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question"). This "essential prerequisite" is missing in this case. Consequently this Court should conclude that it is "unable to address the merits" of the Petitioner's claim, *MacDonald*, 477 U.S. at 348, and should deny his petition.[11]

(d) Although the Petitioner contends that his taking claim is ripe for this Court's review, he adopted a contrary position in the brief he submitted to the trial judge following the Supreme Judicial Court's remand. In that brief, he argues that the case was remanded for the trial judge to determine (i) whether the Commission would approve less extensive sand and gravel

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[11] The Supreme Judicial Court considered both the ripeness issue and the substantive merits of the Petitioner's takings claim, and vacated the trial court's judgment on both grounds; either ground would have been dispositive. The Supreme Judicial Court was able to *reject* the merits of the claim, because there was "ample" evidence that the property had substantial value for uses other than sand and gravel removal. (Pet. App. at 9a n.5.) It would not have been able to *uphold* the claim on its merits, because the record did not support a finding of no remaining productive use. (*Id.* at 7a, 9a-10a.) The burden is on the property owner to show that he has been denied all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.6 (1992).

operations, and (ii) what the "after-imposition" (i.e., post-regulation) value of the property would be. The Petitioner contends in that brief that the judge has sufficient evidence before him to determine that the Commission would not approve other mining proposals, and that the taking claim is therefore ripe. The Petitioner admits, however, that "[a]bsent such determination it is impossible to decide if a taking has occurred." Likewise, he admits that the trial judge "made no determination of the 'after imposition' value of the [Petitioner's] property," and that "this determination is necessary to address the taking claim."[12] The Petitioner requested that the trial judge allow additional briefs and take additional evidence on the value of the property. In short, the Petitioner proclaims to the trial court on remand that the Supreme Judicial Court did not reach a final determination on either the ripeness or substantive takings issues and remanded the case for further findings on each issue.

If, as the Petitioner contends in the remand proceedings, the Supreme Judicial Court has not made a final determination on the issues presented in the petition for certiorari, then this Court is bound by statute to deny the petition, because there has not been a final judgment or decree by the State's highest court respecting the federal question. 28 U.S.C. § 1257(a). As a matter of logic as well as law, this Court should not review the Petitioner's Federal claims while he is still pursuing a decision from the trial judge on those same claims, and where any further decisions by the judge will be subject to additional appellate review by State courts. *See Costarelli v. Massachusetts*, 421 U.S. 193, 196 (1975) (important purpose of "final

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[12] *See* relevant pages from "Plaintiff's Brief Re: Scope of Remand" (Sept. 5, 1997), appended hereto. The Respondent argued to the trial judge that the Supreme Judicial Court *did* make a "final adjudication" of the taking claim, and that the case was remanded solely to address the statutory claim for judicial review of the Commission's decision.

judgment" requirement is to prevent interference with state proceedings when underlying dispute may be otherwise resolved).[13]

(e) The Petitioner contends that the Supreme Judicial Court erred in treating ripeness as a jurisdictional issue not subject to concession or waiver at the trial level. This argument merits only a brief answer. The Commission denies that it "waived" that issue; it did in fact address the ripeness issue in its post-trial memorandum. Furthermore, this Court has spoken conclusively on its right to address the ripeness issue *sua sponte*. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 57 n.18 (1993) (ripeness question may be raised on the Court's own motion, and the Court is not bound by the wishes of the parties); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) (Court not bound by parties' concessions in deciding ripeness, because issue involves exercise of judicial restraint from unnecessarily deciding constitutional issues); *see also Suitum v. Tahoe Regional Planning Agency*, __ U.S. __, 117 S. Ct. 1659, 1669 (1997) (Court addresses "fitness to review" ripeness requirement, raised by defendant for first time); *Bateman v. City of West Bountiful*, 89 F.3d 704, 706 (10th Cir. 1996) (ripeness is issue of subject matter jurisdiction). This Court should respect the right of State courts to adhere to the same policy. Indeed, while the existence of ripeness in a taking claim may be a Federal question because of the constitutional implications, the Petitioner has not shown that a constitutional right is put at risk by procedural rules governing when the ripeness issue may be raised, and by whom.

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[13] This case does not fall within any of the categories of cases where finality may be found despite the existence of further State proceedings. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975).

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CAPE COD COMMISSION
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Dated: November 10, 1997

APPENDIX

Plaintiff's Brief Re: Scope of Remand

(Filed with the Land Court, Sept. 5, 1997)

NOTE: This Appendix contains the exact text of the brief as filed with the Court, including any typographical errors therein.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. LAND COURT DEPARTMENT
CIVIL ACTION NO. 215603 CDJ

FRANCIS E. DADDARIO, Plaintiff v. THE CAPE COD COMMISSION, Defendant	)))) PLAINTIFF'S BRIEF) RE: SCOPE OF) REMAND))

The Plaintiff, Francis E. Daddario, hereby submits this brief regarding the scope of the SJC's remand of the above-captioned matter and in connection with the same states as follows:

I. SUMMARY OF POSITION

The Supreme Judicial Court (hereinafter the "SJC") vacated the decision of the trial court in this matter and remanded this case to the Land Court for further proceedings consistent with their opinion of July 11, 1997. The SJC has remanded the case for determination of the following:

1) Whether less extensive sand and gravel operations may be approved on the property;

2) The "after imposition" value of the property as regulated.

The SJC held that the trial court's decision could not be affirmed because these two issues had not been determined. This Court is now charged with addressing these unresolved issues. Therefore, the Plaintiff respectfully requests this Court to undertake a review of these issues consistent with the Plaintiff's request for further proceedings included herein.

II. THE RIPENESS ISSUE

The SJC has remanded this case to the Land Court for a determination of whether the Cape Cod Commission has reached a final decision regarding the application of the regulations to the property at issue. That is, for a determination of the ripeness issue.

In its opinion, the Court concluded because, among other things, it is possible that less extensive Sand and Gravel operations may be approved . . . we conclude that the findings of the Judge do not support his conclusions that there was a taking." (emphasis added). The SJC does not answer the question of whether less extensive sand and gravel operations could be approved. In fact, the SJC concedes in Footnote 4 at Page 9, that because there has been no final determination regarding the nature and extent of the regulation in this case, it is impossible to tell whether a taking has occurred.[1]

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[1] The SJC also indicates that it need not speculate on this issue where there is clear evidence that the Plaintiff owns more than a mineral estate and property has other valuable uses. The "issue" considered by the SJC in this instance is whether the loss of the sand and gravel use, in and of itself, constituted a categorical taking. The SJC concludes that because the Plaintiff owns more than a mineral estate no categorical taking has occurred, but rather, the ad hoc taking test would have to be applied. The SJC refers to the ad hoc tests in its decision clearly recognizing the viability of a taking claim where "as in the case here" (at p.6) the government action does not involve a complete deprivation of use. Therefore, the Court was simply commenting that it need not consider whether the loss of the sand and gravel use would constitute a taking.

Rather, the SJC has concluded that the findings of the trial court judge, which, in the SJC's assessment lacks a determination regarding the nature and extent of the regulation, is insufficient to support a takings claim. It is the Plaintiff's contention that the trial court's decision is silent on the ripeness issue as it was never raised by the Defendant at trial. That is, the Trial Court never had occasion to rule on the ripeness issue because it was conceded by the Defendant at trial.[2] In fact, the only reason there has been any evidence produced and/or any argument made on the ripeness issue was that the Plaintiff attempted to create a record regarding the issue. As ripeness in a taking case is wholly fact dependant and as there has been no finding on the issue, the matter must be taken up on remand. It would be a manifest injustice now, on remand, for the Defendants to claim that the Plaintiff is not entitled to a determination as to whether the Cape Cod Commission reached a final decision on the Plaintiff's application or to have an opportunity to prove same. If the Defendant's argument is accepted the Plaintiff will have been denied any meaningful opportunity to elicit those facts which support his claim of ripeness. Should this issue not be taken up on remand, as directed by the Court, the Defendants will have prevented <u>any factual</u> findings

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[2] The Trial Court's decision did contain a finding that:

> Prior to the Commission's actions herein, Locus had substantial value as a sand and gravel operation and that thereafter it had little or none.

This would appear to be an implicit holding that the Cape Cod Commission's application of the regulations would not allow less extensive mining and that the Commission's actions were a final decision with regard to the use of the property for sand and gravel excavation. However, as the Defendant did not raise the issue, the Court did not take the next logical step and make a specific findings that the claim was ripe for adjudication. It is this failure which the SJC has determined leaves the rightness question unanswered.

on this issue by simply conceding it at trial. The SJC has recognized that the decision on ripeness cannot be made without considering whether there has been final action by the Commission.

The Plaintiff's contention is that the even limited record now before this Court supports a conclusion that the Plaintiff's claim is ripe. The record, in fact, contains several different basis which would support this Court's affirmative conclusion on this issue. First, the alternatives proposed by the Cape Cod Commission were patently infeasible. There is evidence in the record to support the Plaintiff's contention that the Cape Cod Commission has definitively spoken on the issue of what sand and gravel excavation they would allow. The Plaintiff points to the two "alternative proposals" advanced by the Commission as evidence of same. These proposal, which, as the trial testimony of the Cape Cod Commission's representative reveals, were the only two configurations which the Commission indicated to the Plaintiff it would approve. Each proposal required the Plaintiff to excavate within the 200 foot buffer which the Falmouth Zoning By-Laws requires with its abutter and were therefore infeasible. Second, these "alternative proposals" warrant this Court in concluding that further pursuit of a permit by the Plaintiff would have been futile as it is clear on their face that neither proposal was feasible.

The SJC's finding that the Plaintiff's proposal for sand and gravel may be the only economically viable plan for the site (Footnote 4 at p.9) requires this Court to further consider this issue. The SJC clearly indicates that the issue is left open. If it is true, as the SJC admits is possible, that the Plaintiff's proposal is the only economically viable plan, than this case is, in fact, ripe for review. It is only the trial court's failure to articulate such finding in its decision which would be deficient. The SJC has therefore charged this Court with making that determination.

The SJC's decision goes no further than to hold that the trial court's decision could not be affirmed because of the Court's failure to address the ripeness issue. The SJC did not determine that the case was not ripe for judicial review. The Plaintiff is clearly entitled to a factual finding on this issue given the record before this Court. Because the SJC has concluded that this remains an open question, it is incumbent upon this Court, on remand, to take up this issue. Absent such determination it is impossible to decide if a taking has occurred.

Therefore, the Plaintiff respectfully requests this Court to make such factual determinations as are necessary to answer the question of whether the Cape Cod Commission has reached a final decision regarding an application of the regulations in this instance all as further and more specifically requested by the Plaintiff below.

III. THE ECONOMIC IMPACT

The SJC has remanded this case to the Land Court for a determination of the "after imposition" value of the property. A close examination of the unequivocal language of the Court's decision allows no other interpretation.

In its decision, the SJC concluded that because it was possible that the property has substantial economic value for other uses, the findings of the judge do not support the conclusion that there was a taking. In this regard the Court noted the trial Court's conclusion that a precise after imposition value of the property was not required. The trial court held:

> I do not find it necessary herein to determine precise before and after value . . . I do find that even through [the parcel] may still have sub-

> stantial value for other development . . . the action of the commission has crossed the line . . . to a compensable taking. (emphasis added.)

The SJC, citing Florida Rock Industries v. U.S., 18 F.3d 1560 (Fed.Cir. 1994) went on to hold that:

> since loss of economic use and value is the issue in this regulatory taking case, it is not possible, absent a valid determination in the record of the 'after imposition' value, to know if a taking occurred. It is without question that the trial court made no determination of the 'after imposition' value of the Plaintiff's property.

Therefore, in the SJC's own words it is not possible to know if a taking has occurred. The Defendant however argues that the taking claim has been decided despite the uncontroverted opinion of the SJC that it is impossible to make this decision absent determination of after imposition value. The SJC has provided substantial direction to this Court as what uses should be considered in making the decision as to "after imposition" value.[3] Quite candidly, at first blush, the uses which the SJC directs this court to consider on remand do not appear to bode well for the Plaintiff. However, the Plaintiff does believe that the evidence of "after imposition" value in the rec-

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[3] The SJC concluded that the record contained "ample evidence" to "show that the property has substantial value even without a permit to remove sand and gravel." The SJC noted uses including agricultural and residential. However, the SJC did not make a determination as to the after, imposition value or the value of these uses to the property. This issue is clearly open. Therefore, while the trial court's decision could not be affirmed, this case was, remanded, albeit with some direction from the SJC, for a determination of 'after imposition' value.

ord, and as may be provided by way of further proceedings, will suggest that certain, if not all of the uses referenced by the SJC are of little or no value in the instant circumstances. This is, of course, the reason further proceedings are required. This Court may conclude that these uses have a substantial value and in considering the ad hoc factors, no taking has occurred. However, these uses may prove to be without significance in assessing the after imposition value of the property. In either event, this determination is necessary to address the taking claim.

The Court's treatment of the issue of economic impact also relates back to the question of ripeness. If, in fact, that SJC had determined that this case was not ripe, the Court would have had no reason to reach the substantive taking issues. The trial court's decision could have simply been reversed on ripeness grounds. However, as the question of ripeness has simply been remanded for determination, if was necessary for the Court to analyze the taking claim in the event further proceedings result in a finding of ripeness. Furthermore, albeit a certain amount of bootstrapping, as there is no basis to distinguish between the scope of the SJC's, remand on the ripeness and taking issues, by implication, the taking issue must be viewed as equally subject to further determination by this Court.

IV. THE ORDER ON RESCRIPT COMPELS FURTHER DETERMINATION BY THIS COURT

The SJC's decision to vacate and remand the case for further proceedings consistent with their opinion also supports the Plaintiff's position on the scope of the remand. It must be assumed that this specific language was included for a reason. The Court clearly had numerous options when contemplating

the procedural posture in which this case would be left after its decision. In fact, several prior decisions of the SJC in the takings area are illustrative of this point. In Wilson v. Commonwealth, 413 Mass. 352 (1992) the Court, after concluding that injury to property stemming from an administrative delay was not a taking, reversed the trial court's decision on the taking claim and remanded the case for further proceedings on the remaining issues. Conversely, in Lopes v. City of Peabody, 417 Mass. 299 (1994), a case in which the SJC held that the "case must be remanded to the Land Court for a new hearing and further consideration", the SJC vacated the Judgment and remanded the case to the Land Court for further proceedings consistent with this opinion. The Defendant's argument that the case was vacated and remanded so the Plaintiff could pursue his §17 permit appeal is wholly without merit. The Court remanded for proceedings consistent with their opinion. As the Court did not substantively discuss the §17 claim in its opinion, the suggestion that this language was included to address the procedural posture of the §17 claim is without merit.

V. REQUEST FOR FURTHER PROCEEDINGS

WHEREFORE, the Plaintiff respectfully requests the following:

1. That this Court make a determination as to whether the Cape Cod Commission has reached a final decision regarding the application of the regulations to the property at issue;

2. That this Court allow the parties to submit briefs on this substantive issue and/or, if deemed necessary by this Court,

that the parties be allowed to submit additional evidence on such question;

3. That this Court make a determination as to the "after imposition" value of the Plaintiff's property for the purpose of applying the ad hoc taking test to determine whether there has been a taking of the Plaintiff's property; and

4. The Plaintiff requests this Court to consider the record and to conduct such further and additional proceedings, including the taking of additional evidence on the issue of the after imposition value of the property.

Respectfully submitted,
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By his attorneys

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DATED: September 5, 1997

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97-632 (3)

No. 97 -

In The
Supreme Court of the United States
October Term, 1997

FRANCIS E. DADDARIO,
Petitioner,
v.
CAPE COD COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP, AMERICAN POLICY CENTER, CHICAGO CREATIVE INVESTORS ASSOCIATION, HOMEOWNERS AGAINST RENT KONTROLS, HOUSTON PROPERTY RIGHTS ASSOCIATION, ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION, MAINE CONSERVATION RIGHTS INSTITUTE, PROPERTY OWNING WOMEN, PROPERTY RIGHTS FOUNDATION OF AMERICA AND VIRGINIANS FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2, counsel for Amici Curiae, who are employed by the New England Legal Foundation, have attempted to secure written consent for the filing of the attached Amici Curiae brief from counsel for Petitioner and Respondent. Although Petitioner Francis E. Daddario granted such consent, Respondent Cape Cod Commission withheld it. Accordingly, counsel for Amici Curiae hereby moves this Court for leave to file the Amici Curiae brief which is submitted herewith. Amici Curiae make this motion on the following grounds.

American Association for Small Property Owners is a national grassroots organization of small property owners. Currently, it has approximately 400 members. American Association for Small Property Owners' goal is to restore common sense and equity to federal, state and local regulations, tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

American Policy Center is a non-profit, grassroots action and education foundation. It has approximately 70,000 individual members. American Policy Center's mission, in part, is to enhance national awareness of crucial global and domestic property rights issues.

Chicago Creative Investors Association is an association providing education opportunities for real estate investors in the greater Chicago area. Chicago Creative Investors Association has approximately 300 members.

Homeowners against Rent Kontrols is a non-profit association of small rental building owners in New York City. It has approximately 40 members. Homeowners against Rent Kontrols' mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Houston Property Rights Association is a non-profit, incorporated association of small business people in the greater Houston area. It has approximately 70 members. Houston Property Rights Association's mission, in part, is to fight against unreasonable government intrusions into citizens' rights to hold and use private property.

Illinois Rental Property Owners Association is an organization of rental property owners, investors and managers from Illinois. It has 18 member organizations from around the state, comprising approximately 2000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Maine Conservation Rights Institute is a non-profit organization committed to the application of innovative conservation methods within the context of private property and free market systems. It has approximately 900 associates. Maine Conservation Rights Institute's mission, in part, is to educate the public as to their constitutional property rights.

Property Owning Women is a non-profit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Property Rights Foundation of America is a tax-exempt incorporated association with 1500 members. It represents private property owners nationally. Among its objectives is to promote the fundamental constitutional right to own and use private property.

Virginians for Property Rights is a non-profit umbrella group for grassroots organizations across the Commonwealth of Virginia. It has approximately 350 supporters. Through education, Virginians for Property Rights seeks to protect private property rights, ensure that protective legislation is accurately applied, and promote a balanced conservation approach to preservation and environmental issues

These organizations seek to bring to the Court's attention its views and those of its supporters concerning the scope of the Takings clause under the Fifth and Fourteenth Amendments to the U.S. Constitution. That issue is of significance to the members of these organizations as well as to property owners generally. Amici Curiae believe that the brief submitted herewith may provide an additional perspective which may aid the Court in determining whether to grant the petition for writ of certiorari.

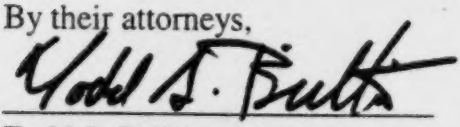
CONCLUSION

For the reasons stated above, American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights, respectfully request that this Court grant Amici Curiae leave to file the attached brief in support of the petition for a writ of certiorari.

Respectfully submitted,

American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights,

By their attorneys,



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DATED: Boston, Massachusetts: November 7, 1997

QUESTIONS PRESENTED

1. Whether, in denying his application to extract loam, sand and gravel, the Cape Cod Commission took Mr. Daddario's mineral estate without just compensation

2. Whether, in denying his application to extract loam, sand and gravel, the Cape Cod Commission partially took Mr. Daddario's property without just compensation.

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No. 97 -

In The

Supreme Court of the United States

October Term, 1997

FRANCIS E. DADDARIO,
Petitioner,
v.
CAPE COD COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP, AMERICAN POLICY CENTER, CHICAGO CREATIVE INVESTORS ASSOCIATION, HOMEOWNERS AGAINST RENT KONTROLS, HOUSTON PROPERTY RIGHTS ASSOCIATION, ILLINOIS RENTAL PROPERTY OWNERS ASSOCIATION, MAINE CONSERVATION RIGHTS INSTITUTE, PROPERTY OWNING WOMEN, PROPERTY RIGHTS FOUNDATION OF AMERICA AND VIRGINIANS FOR PROPERTY RIGHTS IN SUPPORT OF PETITIONER

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of ten organizations (collectively "Amici" or "Amici Curiae").[1] Unless reversed, the Supreme Judicial Court for the Commonwealth of Massachusetts' decision will adversely impact the interests that each organization seeks to promote.

American Association for Small Property Owners is a national grassroots organization of small property owners. Currently, it has approximately 400 members. American Association for Small Property Owners' goal is to restore common sense and equity to federal, state and local regulations, tax and liability and other laws that unduly impinge on the right of small property owners to build wealth with real estate.

American Policy Center is a non-profit, grassroots action and education foundation. It has approximately 70,000 individual members. American Policy Center's mission, in part, is to enhance national awareness of crucial global and domestic property rights issues.

Chicago Creative Investors Association is an association providing education opportunities for real estate investors in the greater Chicago area. Chicago Creative Investors Association has approximately 300 members.

Homeowners against Rent Kontrols is a non-profit association of small rental building owners in New York City. It has approximately 40 members. Homeowners against Rent

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1. Pursuant to Supreme Court Rule 37.6, Counsel for Amici state that neither counsel for Petitioner nor Respondent authored this brief in whole or in part.

Kontrols' mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Houston Property Rights Association is a non-profit, incorporated association of small business people in the greater Houston area. It has approximately 70 members. Houston Property Rights Association's mission, in part, is to fight against unreasonable government intrusions into citizens' rights to hold and use private property.

Illinois Rental Property Owners Association is an organization of rental property owners, investors and managers from Illinois. It has 18 member organizations from around the state, comprising approximately 2000 property owners. Illinois Rental Property Owners Association's mission, in part, is to provide a unified voice for Illinois rental property owners.

Maine Conservation Rights Institute is a non-profit organization committed to the application of innovative conservation methods within the context of private property and free market systems. It has approximately 900 associates. Maine Conservation Rights Institute's mission, in part, is to educate the public as to their constitutional property rights.

Property Owning Women is a non-profit association of small rental building owners in New York City. It has approximately 100 members. Property Owning Women's mission, in part, is to educate the public about the role that small property owners play in the maintenance of New York City's diversity, economic health and quality of life.

Property Rights Foundation of America is a tax-exempt incorporated association with 1500 members. It represents private property owners nationally. Among its objectives is to

promote the fundamental constitutional right to own and use private property.

Virginians for Property Rights is a non-profit umbrella group for grassroots organizations across the Commonwealth of Virginia. It has approximately 350 supporters. Through education, Virginians for Property Rights seeks to protect private property rights, ensure that protective legislation is accurately applied, and promote a balanced conservation approach to preservation and environmental issues.

Unless reversed, the interests that these organizations seek to promote will be adversely affected by the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts. Thus, Amici are concerned with the key issue in this case: the scope of the Takings clause under the Fifth and Fourteenth Amendments to the U.S. Constitution.

Pursuant to Supreme Court Rule 37.2, counsel for Amici, who are employed by the New England Legal Foundation, have attempted to secure written consent for the filing of this brief from counsel for Petitioner and Respondent. Although Petitioner Francis E. Daddario granted such consent, Respondent Cape Cod Commission withheld it. Accordingly, counsel for Amici has filed, and bound with this brief, a motion for leave to file an Amici Curiae brief.

STATEMENT OF THE CASE

Amici accept and adopt the Petitioner Francis E. Daddario's Statement of the Case. *See* Daddario Petition for Writ of Certiorari ("Writ") at 4-7.

SUMMARY OF ARGUMENT

The Cape Cod Commission ("Commission") took private property without providing just compensation through its denial of a permit to extract loam, sand and gravel from Francis E. Daddario's Falmouth, Massachusetts land. Specifically, this Court should find that (1) the Commission's action took Mr. Daddario's mineral estate without just compensation or, in the alternative, (2) the Commission's action *partially* took Mr. Daddario's property without just compensation.

ARGUMENT

I. IN DENYING HIS APPLICATION TO EXTRACT LOAM, SAND AND GRAVEL, THE CAPE COD COMMISSION TOOK MR. DADDARIO'S MINERAL ESTATE WITHOUT JUST COMPENSATION.

Under Massachusetts law, a landowner's mineral estate is treated as a separate estate in land. "'Minerals, mines, quarries and other similar portions of the estate may be conveyed even in fee, while the rest is retained.'" *Gray v. Handy*, 349 Mass. 438, 441 (1965) (citing cases). As such, mineral estates are distinct property interests entitled to separate constitutional protections. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991). These protections should be similar in kind and degree to those afforded to surface estates.

The question is whether those protections should apply to this case. Specifically, the proper inquiry is whether the Cape Cod Commission's denial of Mr. Daddario's application to extract loam, sand and gravel from his property constituted a taking of his mineral estate. *Lucas v. South Carolina Coastal*

Council provides some guidance in answering this inquiry. 505 U.S. 1015 (1992). The *Lucas* Court suggested a test that should be bifurcated. 505 U.S. at 1016 n.7.

First, a court should determine whether an estate is recognized as a property interest under State law. *Id.* In examining the landowner's reasonable expectations, the proper inquiry is "whether and to what degree the State's law has accorded legal recognition and protection" to the owner's specific property. *Id.* This Court has long "evaluated takings claims by reference to the units of property defined by state law." *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, C.J., dissenting).

As stated above, Massachusetts has defined a landowner's mineral estate as a separate estate in land. *See Gray*, 349 Mass. at 441. Much like the coal in Pennsylvania, the loam, sand and gravel on Cape Cod is an "identifiable and separable property interest." *Keystone Bituminous Coal Association*, 480 U.S. at 517 (Rehnquist, C.J., dissenting). And, similar to coal, the "bundle" of rights in these substances are "sparse." *Id.* The right to loam, sand and gravel is essentially the right to extract it. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("'For practical purposes, the right to coal consists in the right to mine it.'").

Second, a court should determine when government regulation "goes too far" and constitutes a taking. *Lucas*, 505 U.S. at 1016 n.7; *Pennsylvania Coal Co.*, 260 U.S. at 415. The *Lucas* Court phrased that question as follows: whether the property owner has been "depriv[ed] of all economically feasible use" of his property. *Lucas*, 505 U.S. at 1016 n.7.

Although the Court did not clearly define the phrase "deprivation of all economically feasible use," this case

presents the opportunity to provide the needed clarity. *Id.* ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."). As in *Lucas*, the mineral estate here has a "rich tradition of protection at common law." *Id.*; *Gray*, 349 Mass. at 441. The trial court in *Lucas*, however, found that the regulation left each of Mr. Lucas's beachfront lots without economic value, 505 U.S. at 1016 n.7, while the SJC found, *see* discussion *infra* at 7-8, that the Commission's action left Mr. Daddario's property as a whole with significant economic value. *Daddario v. Cape Cod Commission*, 425 Mass. 411, 417-18 (1997), Writ at 9a-10a. That finding belies this Court's discussion in footnote 7 of *Lucas*, the rich tradition in the Commonwealth of providing protection to separate mineral estates and, as seen below, the fact that the entire mineral estate here was taken. *Daddario v. Cape Cod Commission*, Misc. Case No. 215603 (Land Ct. 1996), Writ at 21a-29a.

Based on the facts as presented in his brief, Mr. Daddario has been deprived of "all economically feasible use" of this separate estate. *See Lucas*, 505 U.S. at 1016 n.7; Writ at 4-7. The only alternatives to his proposal for mineral extraction of sand and gravel were patently violative of the applicable Zoning By-Law. *Daddario*, Misc. Case No. 215603 (Land Ct.), Writ at 21a-29a. Accordingly, the Commission's denial of Mr. Daddario's permit application for the extraction of loam, sand and gravel constituted a categorical taking of his mineral estate in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution because there is no other economically feasible use for that estate. *See Lucas*, 505 U.S. at 1018-20.

The SJC, however, failed to examine the Commission's actions and the nature of Mr. Daddario's property in the above

manner, i.e., it did not acknowledge that the mineral estate was a separate estate under Massachusetts law; that that estate was categorically taken by the Commission's action because it could no longer be mined; and, accordingly, Mr. Daddario was entitled to compensation. Instead, the SJC looked at his property as a whole and held that the remaining surface estate had substantial value as conservation land or for residential use. *Daddario*, 425 Mass. at 417-18, Writ at 9a-10a. This decision contradicts prior Massachusetts precedent, *see Bates Sand & Gravel Co. v. Commonwealth*, 380 Mass. 933, 933-34 (1980).

In *Bates*, the SJC found that upon a taking by eminent domain of the surface and mineral estates, the owner of a mineral estate is entitled to a separate and distinct claim for compensation. 380 Mass. at 933 n.1 & 934. Hazel L. Sawyer, the owner of the surface estate, granted Bates Sand & Gravel a right of entry; a right to remove sand, gravel, and stone; and a right to participate in the profits derived from the extraction of those materials. *Id.* at 934. The court held that Bates Sand & Gravel therefore owned a profit *à prendre* and not a mere license. *Id.* Accordingly, the company held a "compensable interest" when the property was taken by eminent domain by the Commonwealth and it could participate as a party-plaintiff in the compensation proceedings along with Ms. Sawyer. *Id.* at 933 n.1 & 934.

In addition to contradicting this Massachusetts precedent, the SJC's decision conflicts with two recent Circuit Court pronouncements. In *Whitney Benefits*, the Federal Circuit rejected the SJC's "property as a whole" concept. 926 F.2d at 1174. It held that when examining whether government action took a mineral estate, the proper inquiry is what the value of the mineral estate was before and after the action. *Id.* The residual surface estate does not enter into the calculus. *Id. Accord Florida Rock Indus. v. United States*, 18 F.3d 1560, 1568 (Fed.

Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995).

II. IN DENYING HIS APPLICATION TO EXTRACT LOAM, SAND AND GRAVEL, THE CAPE COD COMMISSION PARTIALLY TOOK MR. DADDARIO'S PROPERTY WITHOUT JUST COMPENSATION.

The Commission's denial of Mr. Daddario's application for a permit to extract loam, sand and gravel from his property has caused him to lose a substantial portion of the value of his property as a whole. Even though the Land Court made no specific factual finding regarding the value of Mr. Daddario's mineral estate, based on the uncontroverted testimony of Mr. Daddario's expert as to the value of the property as a sand and gravel mine, the Commission's expert estimated the loss to be approximately 78% of the property's value. *See* Writ at 6. Such evidence should be sufficient to find that a taking has occurred. The taking of part, but not all, of the economic use of a piece of property may constitute a compensable taking. *See, e.g., Yancey v. United States*, 915 F.2d 1534, 1539, 1542 (Fed. Cir. 1990) (property was taken even though after the governmental action approximately 23% of the property's value remained).

The SJC, however, held that Mr. Daddario's property has significant value as conservation land or for residential use. *Daddario*, 425 Mass. at 417-18, Writ at 9a-10a. Thus, the court concluded that the Commission did not take Mr. Daddario's property. *Id.*

The SJC's holding conflicts with those of other courts. For instance, in *Yancey*, the United States Department of Agriculture imposed a poultry quarantine on two turkey farmers. 915 F.2d at 1536. The Federal Circuit held that the government's action constituted a taking, even though the $91,000 property, turkey breeder stock, was still worth just

under $21,000, after the stock was sold for slaughter. *Id.* at 1539, 1542. The *Yancey* court found that, in examining the property after the offending government action, there was no magic number or percentage of value remaining above which no taking had occurred. *Id.* at 1540. *Accord Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (sale of property for $800,000 more than the original purchase price is not dispositive on the economic impact analysis for taking purposes). Instead, a court must weigh numerous factors including the percentage of diminution in value, "adverse economic impact and unanticipated deprivation of an investment backed interest." 915 F.2d at 1541-42.

Because the loss of the mineral estate here results in a diminution in value of the property as a whole of approximately 78%, based on uncontroverted testimony and the Commission's own estimates, its actions have resulted in a partial taking of Mr. Daddario's property. *See* Writ at 6. He is entitled to compensation for that partial taking. *See, e.g., Yancey*, 915 F.2d at 1539-1543.

Such a conclusion is consistent with public policy. As this Court stated 75 years ago, when the "seemingly absolute protection" of the Takings clause "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co.*, 260 U.S. at 415. Justice Holmes warned, however, that that cannot be accomplished through a regulation that goes too far "under the Constitution of the United States." *Id.* Otherwise, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

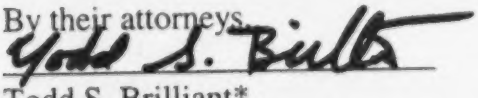
CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America and Virginians for Property Rights,

By their attorneys,



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No. 97-632

In The
Supreme Court of the United States
October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

vs.

CAPE COD COMMISSION,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

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No. 97-632

In The
Supreme Court of the United States
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FRANCIS E. DADDARIO,
Petitioner,

vs.

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Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF THE PETITIONER

Defenders of Property Rights (Defenders), moves this Court pursuant to Rule 21.2(b) of the Rules of this Court for leave to file the attached brief *amicus curiae* to present arguments stating why the Petitioner's petition for a writ of certiorari should be granted. This case raises significant issues regarding the interpretation of the Just Compensation Clause of the Fifth Amendment. Specifically, the Cape Cod

Commission has denied the Petitioner a permit to mine loam, sand and gravel from his property. This permit denial has the effect of drastically reducing Petitioner's ability to make beneficial and productive use of his land and reducing its value by approximately eighty percent.

Defenders' mission is to protect vigorously constitutionally protected property rights. Defenders of Property Rights has participated in every case before this Court involving property rights since its founding in 1991: *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 714 (1995); *Bennett v. Spear*, No. 95-813, Slip op. (S. Ct. March 19, 1997); *Suitum v. Tahoe Regional Planning Agency*, No. 96-243, Slip op. (S. Ct. May 27, 1997); and, *Boerne v. Flores*, No. 95-2074, Slip op. (S. Ct. June 25, 1997). Defenders has also devoted a significant portion of its resources to the litigation of regulatory taking issues across the country on behalf of its members and property owners whose rights have been infringed in violation of the Fifth Amendment. Thus, Defenders believes

that its participation in this case will assist the Court in better understanding and resolving the important constitutional issues at stake in this case.

Counsel for the Petitioner has consented to the filing of the attached brief *amicus curiae* and a letter from Counsel for Petitioner granting consent has been filed with the Clerk of the Court simultaneously with this motion. Counsel for Respondent has refused to consent to the filing of the attached brief *amicus curiae* thereby necessitating the filing of this motion.

For the foregoing reasons, Defenders respectfully requests that this Court grant this motion for leave to file the attached brief *amicus curiae*.

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Dated: November 10, 1997

No. 97-632

In The
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October Term, 1997

FRANCIS E. DADDARIO,
Petitioner,

vs.

CAPE COD COMMISSION,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

Whether the *per se* just compensation requirement announced by this Court in *Lucas* applies to government actions that result in a loss of substantially all but not the total loss of the beneficial and productive use of private property?

Whether courts in an inverse condemnation action may analyze the loss of substantially all beneficial and productive use of the specific property affected by the government action at issue in the case?

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Pursuant to Rule 37.2 of the Rules of this Court, *amicus curiae* submits this brief in support of the Petitioner.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions which have the effect of rendering the Fifth Amendment's Just Compensation Clause worthless. Defenders' mission is to vigorously protect those rights considered essential by the framers of the Constitution, and to promote a better understanding of the relationship between private property rights and other individual rights such as religious liberty. Defenders devotes a significant portion of its resources to litigation and has participated in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *Babbitt v. Sweet Home Chapter Communities for a*

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[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae* (its members or counsel) contributed financially to the preparation of this brief.

Great Oregon, Bennett v. Spear, Suitum v. Tahoe Regional Planning Agency and *Boerne v. Flores* when they were before this Court.

STATEMENT OF THE CASE

At issue in this case are unresolved questions resulting from this Court's opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, the Court held that when "a regulation that declares 'off-limits' all economically productive or beneficial use of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Id.* at 1030.

Lower courts, however, have differed greatly in their interpretation of *Lucas*. For example, one important issue dividing lower courts is what "property" is used to measure the extent to which economic and beneficial use is denied: the specific property interest being regulated, or the owner's entire range of interests in that property. Some courts have gone so far as to hold that a property owner must lose all beneficial and productive use of all of a given property, not just the specific parcel or interest being regulated, before compensation is required. *See, e.g., Florida Game and Fresh*

Water Fish Comm'n v. Flotilla Inc., 636 So. 2d 761, 765 (Fla. Dist. Ct. App. 1994)("Because the property as a whole retained an economic life, we cannot agree that the land use restrictions are compensable.").

Other courts, however, have adopted a different approach to this problem. The United States Court of Appeals for the Federal Circuit has held that, where a large amount of property had been developed over time, that the "takings" analysis need only include the specific property subject to the permit denial being challenged to determine whether all beneficial and productive use had been denied to the property owner. *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

Courts have also grappled with the question of whether the reasoning in *Lucas* also applies to cases where government regulations have eliminated less than all beneficial and productive use of private property even if that loss is substantial, as it is in this case. Some courts have held that the *Lucas* analysis cannot be applied to these "partial takings." *See, e.g., Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (N.J. 1992)(held that a

regulation does not effect a taking unless it denies all practical use of property or substantially destroys beneficial use).

In the *Florida Rock* case, however, the Federal Circuit questioned this narrow and harsh application of *Lucas*:

> Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1568 (Fed. Cir. 1994).

These unresolved issues are of crucial importance to property owners across the country. Since lower courts have been unable to adopt a uniform approach to these problems, guidance from this Court is necessary to resolve these important constitutional issues.

SUMMARY OF ARGUMENT

The facts of this case raise issues relating to the requirements for a *per se* violation of the Just Compensation Clause left unresolved by this Court in *Lucas v. South*

Carolina Coastal Council, 505 U.S. 1003 (1992). Accordingly, this case presents an important opportunity for this Court to clarify its holding in *Lucas*.

This case concerns the denial by Respondent of Petitioner's application for a permit to extract loam, sand, and gravel from his property. Petitioner's property is an approximately seventy acre parcel located in the Town of Falmouth, Massachusetts. At trial, expert testimony indicated that Respondent's permit denial had reduced the value of Petitioner's property by at least seventy-eight percent. After Respondent's permit denial, Petitioner filed the instant lawsuit in state court, asserting claims that his property was taken without payment of just compensation in violation of the United States and Massachusetts Constitutions. While the trial court held that Petitioner was entitled to just compensation for Respondent's permit denial, upon appeal the court below held that the Respondent's actions did not rise to the level of an unconstitutional taking entitling Petitioner to payment of just compensation.

Of particular importance to the issues before this Court are two reasons given by the court below for its

holding. First, the court below found that there was substantial beneficial and productive use left in Petitioner's property because Petitioner's rights in the surface estate of his property had to be considered in the takings analysis. In reality, however, the permit denial only affected, and in fact completely eliminated, Petitioner's rights in the mineral estate on his property—a separate and distinct property interest recognized under Massachusetts law.

This finding by the court below is squarely at odds with the holdings of other courts, including the United States Court of Appeals for the Federal Circuit, which has held that the takings analysis can involve only the property interest that is the subject of the regulation being challenged. *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Indeed, this Court has never provided an across-the-board rule for addressing what property interests constitute the "denominator" to determine what fraction of the beneficial and productive use of property has been eliminated by government action. This is an extremely important issue in "takings" litigation that literally affects every claim for

inverse condemnation brought under the Just Compensation Clause of the Fifth Amendment.

The court below also found that this remaining "substantial" beneficial and productive use of Petitioner's property precluded the trial court from awarding just compensation to the Petitioner, even though, as previously indicated, Petitioner's property had lost at least seventy-eight percent of its fair value. Pet. App. at 9a. The theory advanced by the court below for this finding was that the possibility of remaining beneficial and productive use was sufficient to defeat a takings claim. Pet. App. at 10a. The court below, citing this Court's opinion in *Lucas*, reached this result by relying on the *ad hoc* balancing test previously advanced by this Court in *Penn Central Transportation. Co. v. New York City*. Pet. App. at 7a. Essentially, the court below construed *Lucas* to mean that *only* a denial of all beneficial and productive use satisfies the *per se* takings analysis.

This Court, however, explicitly limited its holding in *Lucas* to the particular facts of that case. *Lucas* involved a situation where there was unquestionably little or no

remaining beneficial and productive use of the subject property in that case. *Lucas*, 505 U.S. at 1020. In holding that this factual situation constituted an unconstitutional taking *per se*, this Court pointedly refused to hold that the category of *per se* takings is limited solely to those situations where substantially all beneficial and productive use of property has been precluded. *Id.* at 1019 n.8.

The issues and facts raised by the present case provide the Court with an opportunity to clarify whether the holding in *Lucas* also applies to those situations involving substantial, but not total, elimination of beneficial and productive use of property.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court's opinion in *Lucas v. South Carolina Coastal Council* stands as a landmark in Fifth Amendment jurisprudence. The Court has, in effect, lifted a whole class of cases out of the difficult *ad hoc* balancing test previously employed by this Court in regulatory takings cases. *See Penn Central Transportation Co. v. New York*, 438 U.S. 104

(1978). Despite the seminal importance of *Lucas*, however, there are at least two major issues regarding "*per se*" takings arising out of *Lucas* that have not yet been addressed by this Court. These issues are the extent of the property interests to be considered in the takings analysis and to what extent the *per se* takings analysis applies to government regulations that substantially reduce, but do not entirely eliminate, the beneficial and productive use of private property.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY WHETHER THE SPECIFIC PROPERTY INTEREST SUBJECT TO THE REGULATION AT ISSUE IN A CLAIM FOR JUST COMPENSATION MAY BE USED AS THE BASIS FOR THE TAKINGS ANALYSIS.

In the present case, Petitioner was applying to Respondent for permission to utilize the mineral estate on his property by extracting loam, sand and gravel. Pet. App. at 3a-4a. The mineral estate has long been recognized as a separate and distinct property interest from the surface estate under Massachusetts law. *Gray v. Handy*, 208 N.E.2d 829 (Mass. 1965). Thus, the true impact of the Respondent's permit denial, total elimination of the use of the Petitioner's mineral estate, was avoided by the court below by treating

the whole parcel, including use of the surface estate, owned by Petitioner as the "subject property" of this takings action.

In *Lucas*, this Court indicated that it did not have an opportunity to address this issue:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. . . . we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7(1992).

The present lack of guidance from this court on the "measuring interest" issue has created conflict and uncertainty in the lower courts. The holding of the court below regarding the property interest to be utilized in the takings analysis is squarely in conflict with other courts, including the United States Court of Federal Claims, as evidenced by that court's opinion in *Whitney Benefits v. United States*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*,

112 S. Ct. 406 (1992). In *Whitney Benefits*, plaintiffs had entered into a leasing agreement to extract coal and had incurred other expenses in anticipation of mining. Congress thereafter enacted the Surface Mining Control and Reclamation Act, which required plaintiffs to obtain a mining permit. Plaintiffs' strip mining operation was denied because the planned activity potentially could have disturbed the underground water table that was essential to local farming. The court rejected the government's argument that there was no taking because plaintiffs still could ranch and farm the surface of the land. Plaintiffs were claiming only that mineral rights were taken, and applicable state law recognized the mineral estate as a separate unit of property. There was a *total* deprivation of the value of this mineral estate—without the permit, no coal could be mined and there were no other extractable minerals on the land.

Not only does the reasoning of the court below conflict with *Whitney Benefits*, but many other cases less factually related, as well. For example, in *Loveladies Harbor v. United States*, 28 F.3d 1171 (1994), the Court of Federal Claims limited its focus to the "value of that property which

Claims limited its focus to the "value of that property which plaintiffs held when the taking was said to have occurred." when the government defendant had asked the court to use a much larger parcel that had originally been purchased together with the regulated parcel as the basis for analysis of the takings claim.

Indeed, even prior decisions of this Court appear to conflict with each other concerning this question of Fifth Amendment jurisprudence. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)(focus was on the easement taken, not on the regulation's impact upon the property as a whole) ; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)(focused only upon one-eighth cubic foot of apartment building roof space taken as a result of cable installation regulation). *But see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978)(holding that ability to transfer development rights to adjacent parcels in common ownership with subject parcel precluded finding of compensable taking).

II. THERE IS CONFUSION IN STATE COURTS AND LOWER FEDERAL COURTS REGARDING THE PERCENTAGE OF LOSS IN VALUE THAT TRIGGERS THE *PER SE* REQUIREMENT FOR JUST COMPENSATION ANNOUNCED BY THIS COURT IN *LUCAS*.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the property owner was unable to secure permission from the government to build two houses on lots which were zoned for single-family residential construction at the time of purchase. The state's passage of the Coastal Zone Management Act effectively operated as a ban on the building of any habitable structure on the property owner's two lots. The trial court held that the ban deprived the property owner of any "reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless" and thus was an unconstitutional taking of property. *Id.* at 1009.

This Court agreed, noting that "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common

good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).

The *Lucas* opinion, however, did not (and could not) address the issue of whether the *per se* takings rule may be applied to situations in which a subtantial percentage, but not all, of the economically beneficial and productive use of private property had been taken away by government regulations. The facts of *Lucas* did not provide such a situation, so that any opinion by the Court on this issue could possibly have been characterized as dicta.

Indeed, the language of *Lucas* indicates ambiguity as to whether the *per se* takings rule can be applied to partial takings. In addressing Justice Stevens' dissent, the Court states that

> [Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner *might* not be able to claim the benefit of our categorical formulation. . . .

Id. at 1019 n.8 (emphasis supplied).

The decision of the court below in this case and the opinions of other lower courts indicate that further

clarification is needed from this court whether the *per se* takings analysis may be applied to situations where property retains some economically beneficial and productive use in the face of government regulation. Despite the fact that even Respondent's expert appraisal testimony at trial conceded that Petitioner's property had been reduced by seventy-eight percent due to Respondent's permit denial, the court below held that Petitioner's property retained "substantial" use. Pet. App. at 9a. Citing the opinion of the United States Court of Appeals for the Federal Circuit in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), the court below held that the existence of these other potential uses of Petitioner's property precluded Petitioner from successfully asserting his claim for just compensation. Pet. App. at 10a.

In other instances where courts have faced severe reductions (although not total elimination) of market value, however, they have not hesitated to find a taking. In *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), for example, the Army Corps of Engineers denied plaintiffs a permit to fill 12.5 acres of wetlands. Using fair market value, which takes into account the highest and best

use of the land, the United States Claims Court compared the value of the 12.5 acres before and after the Corps' denial of the permit. The highest and best use of the land before the government's action was the construction of a 40-lot residential development, resulting in a fair market value of $2,658,000. Yet, after the Corps' action the land only could support recreation and conservation uses (hunting, bird watching, harvesting salt hay), resulting in a mere fair market value of $12,500. This drastic decline in value, when coupled with the elimination of reasonable future uses, was sufficient for the court to find that a taking had occurred. Other cases have established that government regulations that take away a substantial part, but not all, of the value of private property require payment of just compensation. *See, e.g., Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990)(77% reduction in value of turkey breeding stock due to USDA regulation required payment of just compensation).

The Federal Circuit even more explicitly questioned the limitation of the *per se* rule to total takings in its opinion in *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). In holding that a property owner

whose property value had been reduced in value by at approximately sixty percent through federal wetlands regulation could be entitled to just compensation, the court stated that

> Nothing in the language of the Fifth Amendment compels a court to find a taking only when the Government divests the total ownership of the property; the Fifth Amendment prohibits the uncompensated taking of private property without reference to the owner's remaining property interests. In *Lucas*, the Supreme Court touched upon the question of a partial regulatory taking. . . . but, concluding on the facts before it that the case was one in which the owner was called upon 'to sacrifice all economically beneficial uses in the name of the common good,". . . . the Court found a categorical taking and thus did not have to decide the partial taking question.

Id. at 1568-69 (citations omitted).

In short, the conflict between the lower court's decision in the present case and those of other courts provides an excellent opportunity for this Court to clarify the extent of the categorical takings rule most recently addressed by this Court in *Lucas*.

CONCLUSION

The opinion of the court below in this case creates the unfair and extreme result for Petitioner that the loss of at least

seventy-eight percent of the value of his property from Respondent's permit denial does not entitle Petitioner to just compensation for this loss. This result highlights the confusion and uncertainty surrounding the application of this Court's opinion in *Lucas*. Accordingly, *amicus curiae* hereby respectfully urges this Court to grant the petition for a Writ of Certiorari and resolve these significant constitutional issues.

Respectfully submitted,

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November 10, 1997

Supreme Court, U.S.
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No. 97 - 632

IN THE

Supreme Court of the United States

October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION OF RESPONDENT TO MOTION BY DEFENDERS OF PROPERTY RIGHTS FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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REASONS FOR OPPOSING THE MOTION

Pursuant to Supreme Court Rule 37.5, the Respondent Cape Cod Commission hereby opposes the motion dated November 10, 1997, made by the Defenders of Property Rights as Amicus Curiae, seeking leave to file a brief ("Brief") in support of the Petitioner Francis E. Daddario's petition for a writ of certiorari.[1] The Respondent states the following reasons for its opposition to the motion:

1. The Brief does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties"; its filing would merely burden the Court and is not favored. Supreme Court Rule 37.1. A motion for leave to file an amicus curiae brief is particularly disfavored when it is presented before the petition for writ of certiorari has been granted. Supreme Court Rule 37.2 (b). The Brief is duplicative; it addresses the same "taking" issues already presented by the Petitioner in his petition for writ of certiorari, and does not offer a different perspective or place this case in a broader context.[2] Furthermore, as is discussed infra, the Brief misstates factual findings and rulings of law in the proceedings below and holdings by this Court, and thereby clouds, rather than clarifies, the fitness of this case for

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[1] The Amicus Curiae failed to follow the procedure specified in Supreme Court Rule 37.2 for the submission of an amicus curiae brief before the Court's consideration of a petition for a writ of certiorari. Rule 37.2 allows such a brief to be filed if all parties consent, or by leave of the Court if a party has withheld its consent. The Amicus Curiae states in its motion that the Respondent "refused to consent" to the filing of the Brief. In fact, the Respondent has no record of ever receiving a request for its consent from the Amicus Curiae.

[2] In addition to rejecting the Petitioner's regulatory taking claim on its merits, the Supreme Judicial Court found that the taking claim was not ripe. See Daddario v. Cape Cod Comm'n, 425 Mass. 411, 414-15 (1997) (Petition for Writ of Certiorari Appendix at 5a-7a). The Brief addresses the taking claim, but ignores the ripeness issue.

review by the Court. These errors render the Brief unreliable and of little value to the Court in considering the petition for writ of certiorari.

2. The unfamiliarity of the Amicus Curiae with the prior proceedings may explain, though it does not excuse, the Brief's erroneous assertions as to what transpired in the State trial and appellate courts.[3] The Brief mischaracterizes findings and rulings of those courts, and fails to distinguish between the Petitioner's assertions and those courts' actual conclusions. For the sake of brevity, the Respondent lists only some egregious examples:

a. The Brief asserts that, at trial, "expert testimony indicated that Respondent's permit denial had reduced the value of Petitioner's property by at least seventy-eight percent," and that the Respondent's expert "conceded" this reduction. (Brief at 7, 15.) In reality, the Respondent's expert appraiser testified that the estimate of value for sand and gravel mining offered by the Petitioner was speculative because of the lack of on-site geological investigations. The Petitioner's estimate was never adopted by the trial court, and the Supreme Judicial Court noted that there had been no final determination as to either the extent of the regulation or the "after-imposition" value. Daddario v. Cape Cod Comm'n, 425 Mass. 411, 417-18 (1997) (see Petition for Writ of Certiorari ("Pet.") Appendix ("App.") at 9a-10a).

b. The Brief offers a misleading summation of the Supreme Judicial Court's decision to reject the Petitioner's taking claim. According to the Brief, the Supreme Judicial Court found

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[3] The Amicus Curiae did not participate in the prior appellate review of this case by the Massachusetts Supreme Judicial Court, as it could have done under that court's procedures. See Mass. R. App. P. 17 (brief of amicus curiae may be filed by leave of appellate court). (Several amicus curiae briefs were filed at that time in support of the Respondent.) Having forgone the opportunity to express its views on an earlier occasion, the Amicus Curiae now seeks to support the Petitioner with little knowledge of the trial record or the proceedings before the Supreme Judicial Court.

that substantial beneficial and productive use remained from rights in the surface estate of the Petitioner's property, precluding an award of just compensation in spite of complete elimination of the rights to the mineral estate and a diminution of seventy-eight percent of the property's total value. (Brief at 6-7, 15.)[4] In fact, the Supreme Judicial Court considered the impact of regulation on the property as a whole, analyzed the taking claim according to the factors suggested by this Court in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), and concluded that the property, as a whole, retained substantial value. (Pet. App. at 7a-10a.) The Supreme Judicial Court never accepted the Petitioner's theory that separate mineral and surface estates, requiring independent analysis, existed in the property.

Moreover, the Supreme Judicial Court clearly rejected the Petitioner's fundamental contention that the regulatory decision had eliminated all potential value from sand and gravel mining on the property. That court noted that the Respondent's staff had "demonstrated a willingness to permit less extensive mining proposals. The denial of a particular plan cannot be equated with a refusal to permit any development." (Pet. App. at 9a.) Thus, the Supreme Judicial Court's findings undermine entirely the Amicus Curiae's attempt to depict this case as one in which a regulation has eliminated totally the value of a separate mining estate.

c. The Brief states that "the trial court held that Petitioner was entitled to just compensation for Respondent's permit denial . . ." (Brief at 5), implying that compensation was awarded. Actually, the trial judge concluded that the denial constituted a taking, but did not order the payment of compensation, and never made any finding as to the value of the property

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[4] Neither the trial court nor the Supreme Judicial Court found that the denial of a mining permit had reduced the value of the Petitioner's land by seventy-eight percent, or by any other percentage or absolute number.

pre- and post-regulation. Instead, the trial judge ordered the Respondent to approve the permit application, with two minor conditions. (Pet. App. at 17a-18a, 26a-29a.) Because the Supreme Judicial Court concluded that the trial judge erred in finding that a taking had occurred, that court vacated the order requiring permit approval. (Pet. App. at 2a, 4a-5a.)

3. The Brief is equally misleading in summarizing this Court's holdings on regulatory takings. One example will suffice. In arguing that Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), "indicates ambiguity as to whether the per se takings rule can be applied to partial takings" (Brief at 14), the Brief quotes selectively from Lucas, 505 U.S. at 1019 n.8. The purported "ambiguity" is eliminated by examining the remainder of the first paragraph in the footnote, which the Brief deleted:

> *"[Justice Stevens'] analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation,* but, as we have acknowledged time and time again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). It is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these 'all-or-nothing' situations."

Lucas, 505 U.S. at 1019-20, n.8 (emphasis in original) (text quoted by Amicus Curiae in italics, text deleted by Amicus Curiae in plain font). The fuller quotation makes it clear that where the owner of real property has not been deprived of "all economically beneficial uses," id. at 1019, a per se categorical taking has not occurred, and the Penn Central analysis is to be carried out. As stated in Penn Central, 438 U.S. at 124, no "set formula" exists for determining when a taking

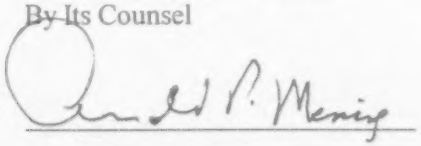
has occurred; the decision depends on the circumstances of the case, and requires an ad hoc inquiry involving a number of significant factors (including those mentioned in the quotation from Lucas, supra, and also "the character of the government action"). Any ambiguity in the analysis of a regulatory taking claim arises not from this Court's consistent holdings as to the analytical procedures to be followed, but only from the inherently case-specific nature of the inquiry. The Supreme Judicial Court followed the procedures specified by this Court. (See Pet. App. at 7a-9a.)

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the motion by the Defenders of Property Rights for leave to file an amicus curiae brief in support of the petition for a writ of certiorari.

Respectfully submitted,

CAPE COD COMMISSION
By Its Counsel



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Dated: November 19, 1997

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No. 97 - 632

IN THE

Supreme Court of the United States

October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION OF RESPONDENT TO MOTION BY NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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REASONS FOR OPPOSING THE MOTION

Pursuant to Supreme Court Rule 37.5, the Respondent Cape Cod Commission hereby opposes the motion dated November 7, 1997 made by the New England Legal Foundation, as counsel for various Amici Curiae,[1] seeking leave to file a brief ("Brief") in support of the Petitioner Francis E. Daddario's petition for a writ of certiorari. The Respondent states the following reasons why it withheld consent to the filing of the Brief:

1. The Brief does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties"; its filing would merely burden the Court and is not favored. Supreme Court Rule 37.1. A motion for leave to file an amicus curiae brief is particularly disfavored when it is presented before the petition for writ of certiorari has been granted. Supreme Court Rule 37.2 (b). The Brief is duplicative; it addresses the same "taking" issues already presented by the Petitioner in his petition for writ of certiorari,[2] and does not offer a different perspective or place this case in a broader context.[3]

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[1] American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners Against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America, and Virginians for Property Rights.

[2] The Amici Curiae, and their counsel, did not participate in the prior appellate review of this case by the Massachusetts Supreme Judicial Court, as they could have done under that court's procedures. See Mass. R. App. P. 17 (brief of amicus curiae may be filed by leave of appellate court). (Several amicus curiae briefs were filed at that time in support of the Respondent.) Having forgone the opportunity to express their views on an earlier occasion, the Amici Curiae now seek to support the Petitioner with little knowledge of the trial record or the proceedings before the Supreme Judicial Court.

[3] In addition to rejecting the Petitioner's regulatory taking claim on its merits, the Supreme Judicial Court found that the taking claim was not ripe. See Daddario v. Cape Cod Comm'n, 425 Mass. 411, 414-15 (1997) (Petition for Writ of Certiorari Appendix at 5a-7a). The Brief addresses the taking claim, but ignores the ripeness issue.

2. To the extent that the Brief cites cases not discussed in the petition for writ of certiorari, those cases are inapposite to the claim for which they are offered as support: namely, that Massachusetts recognizes a landowner's mineral estate as a separate estate in land, for which just compensation is due when all economic value of that separate estate is taken. (The Amici Curiae's premise that the Petitioner has been deprived of all value of the property for sand and gravel mining ignores the holding below. The Supreme Judicial Court determined that the denial of the Petitioner's mining proposal "did not preclude less extensive sand and gravel operations." Daddario v. Cape Cod Comm'n, 425 Mass. 411, 417 (1997) (Petition for Writ of Certiorari Appendix at 9a). See also Respondent's Brief in Opposition at 8.)

In the two Massachusetts cases cited by the Amici Curiae on this issue, and also in a prior case which was relied on by the court in one of those cited cases, the right to remove sand or other minerals had been transferred by the owner of the underlying property to another party. See Bates v. Commonwealth, 380 Mass. 931, 931-932 (1980) (where landowner had granted plaintiff right to enter and remove sand and gravel (rights defined as a profit à prendre), plaintiff held present interest in land and was entitled to portion of eminent domain damages); Gray v. Handy, 349 Mass. 438, 440-441 (1965) (grant of privilege to take sand from grantor's property to build cranberry bogs, roads and dikes on land conveyed to grantee was a profit à prendre, appurtenant to grantee's dominant estate); Hunt v. Boston, 183 Mass. 303, 305 (1903) (landowner may convey complete ownership of portion of estate, such as mines and quarries, while retaining general ownership of whole tract for other purposes, but conveyed right ceased to have separate existence after tax sale of underlying property). By contrast, in the case at hand, the Petitioner owned the property in fee simple, and whatever mining rights he possessed inhered

in his title: the right to mine sand and gravel had never been identified as a separate property interest (at least, not until the Petitioner sought to establish a basis for a taking claim), nor had it been conveyed as a separate interest. The cases cited by the Amici Curiae involve separate ownership of a "strand" that had previously been part of the entire "bundle" of a landowner's property rights, and those cases are not relevant, therefore, to determining if compensation is due when a fee owner is precluded from using his land for one purpose, while retaining the right to put the land to other beneficial uses.

This Court has stated clearly that a property owner's rights are viewed in their entirety when evaluating a regulatory taking claim. See Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"). The Brief simply ignores precedents the Amici dislike.

3. In order for this Court to consider the Petitioner's claim, which is based on the supposed existence of a separate mineral estate, the Court would have to determine the extent to which Massachusetts property law recognizes and protects mineral rights, owned as part of the fee simple, as a separate property interest, a topic not addressed in the Supreme Judicial Court's decision. (Respondent's Brief in Opposition at 6, n.4.) As demonstrated by the cases discussed in Paragraph 2, supra, Massachusetts property law offers no support for treating mineral rights

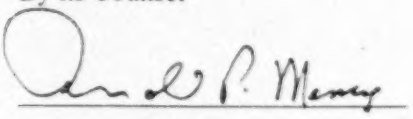
which have always been part of a fee simple as a separate, unrelated estate once a taking claim is asserted.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the motion by the New England Legal Foundation, as counsel for Amici Curiae, for leave to file a brief in support of the petition for writ of certiorari.

Respectfully submitted,

CAPE COD COMMISSION
By Its Counsel



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